No. 83-1919-CFX
Status: GRANTED

Title: City of Oklahoma City, Petitioner
v.
Rose Marie Tuttle, etc.

Docketed:
May 24, 1984

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Bailey, Burck

Counsel for respondent: Hughes, Carl

Entry	Date	Note	Proceedings and Orders
1	May 24 1984	G	Petition for writ of certiorari filed.
2	Jun 18 1984		Brief of respondent Rose Marie Tuttle in opposition filed.
3	Jun 20 1984		DISTRIBUTED. September 24, 1984
4	Jul 23 1984		Record filed.
5	Jul 23 1984		Certified original record, volumes 1 thru 27, received
6	Jul 28 1984		Record filed.
7	Oct 1 1984		Petition GRANTED.
			**********
8	Nov 15 1984		Brief amicus curiae of Oklahoma filed.
9	Nov 15 1984		Brief of petitioner Oklahoma City filed.
10	Nov 15 1984		Joint appendix filed.
11	Dec 4 1984		SET FOR ARGUMENT. Tuesday, January 8, 1985. (1st case)
12	Dec 6 1984		CIRCULATED.
13	Dec 15 1984	X	Brief of respondent Rose Marie Tuttle filed.
14	Dec 15 1984	X	Brief amicus curiae of American Civil Liberties Union, et filed.
15	Jan 8 1985		ARGUED.

83-1919

No. .....

Office - Supreme Court, U.S.
FILED
MAY 24 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Burck Bailey
Counsel of Record
Margaret McMorrow-Love
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
24th Floor, First National Center
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

May, 1984

34 pp

QUESTION PRESENTED

Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. §1983.

PARTIES INVOLVED

The petitioner herein, the defendant-appellant/cross-appellee below, is the City of Oklahoma City, a municipal corporation organized and existing under the laws of the State of Oklahoma. An additional defendant in the United States District Court for the Western District of Oklahoma was Julian Rotramel, a former police officer for the City of Oklahoma City.

The respondent, the plaintiff-appellee/cross-appellant below, is Rose Marie Tuttle, individually and as administratrix of the Estate of William Adam Tuttle, deceased.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Parties Involved	ii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1
Statutory Provision	2
Statement	2
Reasons for Granting the Writ:	
I. The Decisions Support the Proposition That an Isolated Incident of the Use of Excessive Force Does Not Render a Municipality Liable in Damages	8
A. Decisions of This Court	8
B. Recent Decisions of Federal Courts of Appeal	9
C. Other Recent Decisions Involving the Establishment of Official Policy or Custom	13
Conclusion	15
Appendix "A" — Opinion of the United States Court of Appeals for the Tenth Circuit, February 28, 1984	
Appendix "B" — Judgment in the United States District Court for the Western District of Oklahoma, June 7, 1982	

TABLE OF AUTHORITIES

Cases	PAGE(S)
Adickes v. *S.H. Kress & Co.*, 398 U.S. 144	13
Berry v. *McLemore*, 670 F.2d 30 (5th Cir. 1980)	13
Edmonds v. *Dillin*, 485 F.Supp. 722 (N.D. Ohio 1980)	14
Hayes v. *Jefferson County, Kentucky*, 668 F.2d 869 (6th Cir. 1982)	11
Herrera v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981)	11
Languirand v. *Hayden*, 717 F.2d 220 (5th Cir. 1983)	9, 10, 11, 14
Leite v. *City of Providence*, 463 F.Supp. 585 (D. R.I. 1978)	13-14
Memphis Police Department, et al. v. *Garner*, No.	7
Monell v. *Department of Social Services*, 436 U.S. 658 (1978)	7, 8, 10, 13, 14
Polk County v. *Dodson*, 454 U.S. 312 (1981)	7, 8, 14
Rizzo v. *Goode*, 423 U.S. 362 (1976)	7
Turpin v. *Mailet*, 619 F.2d 196 (2d Cir. 1980)	13
Tuttle v. *City of Oklahoma City*, 728 F.2d 456 (1984)	1, 5-6
Wellington v. *Daniels*, 717 F.2d 932 (4th Cir. 1983)	10, 11, 14
United States Code	
28 U.S.C. §1254(1)	1
42 U.S.C. §1983	2

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1983

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on February 28, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 728 F.2d 456 and is reproduced as Appendix "A" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION

42 U.S.C. §1983 provides, in part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immmunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or any proceeding for redress."

STATEMENT

The City of Oklahoma City is a municipal corporation located in Oklahoma County, Oklahoma. Julian Rotramel was a police officer with the Oklahoma City Police Department on October 4, 1980, having completed 18 weeks of training at the Oklahoma City Police Academy in 1979.

William Adam Tuttle, deceased, was an Oklahoma resident who had relocated recently to Oklahoma City. On October 4, 1980, after a quarrel with his wife, he went to the "We'll Do Club", a drinking establishment, where he remained on and off all day and into the evening consuming alcoholic beverages. That evening, at approximately 8:00 p.m., he sustained a gunshot wound from which he died at 9:22 p.m. The gunshot was fired by Julian Rotramel.

Julian Rotramel was on duty with the police department on the evening of October 4, 1980. He was riding alone in his police car. He had previously graduated from the Police Academy and had ridden for several months with a senior patrolman assigned to the different areas of Oklahoma City.

On the evening of October 4, 1980, the decedent, William Tuttle, called the Oklahoma City Police Department to report a robbery in progress at the "We'll Do Club". He described the robber as brown-haired, white and approximately 37 years old, wearing colored glasses. The description matched Tuttle's physical appearance. He also reported that the robber had a gun. After placing the call, Tuttle informed a patron at the bar that "he was going to be shot that night". The police dispatcher sent out an all-points bulletin of a robbery in progress at the "We'll Do Club." Officer Rotramel responded to the call. He arrived at the club, parked his police vehicle and entered the club.

Upon entering the club, he observed ten to fifteen people. William Tuttle looked towards the officer and began walking towards him. Rotramel reached out, took hold of Tuttle's arm and requested him to stay within the club. Tuttle attempted to walk past Rotramel and was told to "stay put".

The officer proceeded to question other individuals in the bar while holding onto Tuttle. Tuttle attempted to bend towards his feet and continued to try to squirm loose from the officer and leave the club. Tuttle broke away from the officer. Rotramel ordered Tuttle to "halt" which command was ignored. Tuttle cleared the door which sprang shut in the face of the officer. Upon clearing the doorway, and having Tuttle in clear view, Rotramel pulled his revolver from his holster. He observed Tuttle in a crouched position with his hands located near his boot. It was the officer's belief that the suspect had recovered a weapon from his boot. Officer Rotramel believed that his life was in danger. Tuttle started to come up from his

crouched position, at which time Rotramel discharged his revolver.

Following the shooting, Tuttle was transported by ambulance to the Baptist Medical Center in Oklahoma City. During the course of his treatment, medical personnel disrobed him. When his boot was removed, a toy cap pistol fell to the cart. He was pronounced dead at 9:22 p.m.

Rose Marie Tuttle, individually and as administratrix of the estate of the decedent, William Adam Tuttle, filed an action in the United States District Court for the Western District of Oklahoma. The Complaint sought recovery under 42 U.S.C. §§ 1983, 1985, 1986 and 1988. She alleged that the defendants, including petitioner, the City of Oklahoma City, had violated the constitutional and statutory rights of the decedent, William Adam Tuttle. As to the City of Oklahoma City, Mrs. Tuttle alleged that the City inadequately trained its police officers and hired inadequately trained personnel. She further stated that the City should have known of the propensity of Rotramel for violence and knew or should have known that Rotramel was untrained to handle the situation as it arose on the night of October 4, 1980.

The City denied the allegations and alleged that the actions of the officer were reasonable under the circumstances and that he was properly trained and supervised and that Tuttle's death did not result from any improper training or supervision or from any official municipal policy or practice.

The trial commenced on May 28, 1982. No evidence was introduced of any prior incidents of violence or improper conduct or behavior on behalf of Officer Rotramel. Likewise, there was no testimony of any prior incidents of violence, misconduct or unauthorized use of force by any officer on the Oklahoma City Police Department. The only incident brought before the jury as to the use of force was the incident on the night of October 4, 1980. Both parties introduced evidence of the training received by Oklahoma City Police officers including training in the guidelines under which the use of force would be authorized.

The jury returned a verdict on the evening of June 3, 1982. The verdict was in favor of the plaintiff and against the City of Oklahoma City but in favor of the co-defendant, Julian Rotramel and against the plaintiff. On June 4, 1982, the court entered judgment pursuant to the verdict rendered by the jury in favor of the plaintiff, Rose Marie Tuttle, individually and as administratrix of the estate of William Adam Tuttle, deceased, and against the City of Oklahoma City in the amount of $1,500,000.

The City of Oklahoma City filed a motion for judgment notwithstanding the verdict on June 24, 1982, which was overruled on August 11, 1982. An appeal was brought by the City of Oklahoma City to the United States Court of Appeals for the Tenth Circuit. A cross-appeal was filed by Rose Marie Tuttle from the decision rendered by the jury in favor of Officer Rotramel. On February 28, 1984, the Court of Appeals entered its opinion affirming the judgment below.

The principal issue on appeal was whether a single, isolated occurrence of the use of force results in municipal liability under 42 U.S.C. §1983. The Court of Appeals found that "The single incident rule is not to be considered as an

absolute where the circumstances plainly show a complete lack of training". 728 F.2d at 461.

Judge Barrett issued what he classified as a "concurring" opinion. However, in his concurring opinion, he stated "I am at a loss to ascertain the basis for the jury's obvious finding that Officer Rotramel was so lacking in training to cope with robberies that such constituted *proof* of Oklahoma City's violation of its duty to train Officer Rotramel to the extent that, as the opinion pinpoints it, it amounted to Oklahoma City's 'deliberate indifference to the rights of its citizens'. * * * I have not been enlightened with the factual basis of Oklahoma City's 'deliberate indifference' in the context of the facts of this case." 728 F.2d at 461, 462.

On the cross-appeal by Mrs. Tuttle from the decision in favor of Officer Rotramel, the court held that it could not asssume that the conclusion of the jury was improper.

REASONS FOR GRANTING THE WRIT

The issue of a municipality's liability for alleged inadequacies in training and supervision of police officers has been and continues to be highly ambiguous. The issue is even more troublesome when the question of liability arises from an isolated incident of excessive use of force by a police officer. The important federal question presented by this case is whether a single incidence of the use of excessive or deadly force by a police officer establishes an "official policy or custom" sufficient to render a municipality liable. This Court's decisions in *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); and *Polk County* v. *Dodson*, 454 U.S. 312 (1981), support a negative answer and a judgment vindicating petitioner's position. The decision involved herein is also in clear conflict with decisions of other Federal Courts of Appeal on this issue.

In addition, this Court has granted the petition for a writ of certiorari in the matter of *Memphis Police Department, et al.* v. *Garner*, No. _____, a matter involving the use of deadly force under a Tennessee statute. That case presents wholly different issues to this Court. However, the granting of this petitioner's writ of certiorari, coupled with that in *Memphis Police Department, et al.*, would afford this Court an opportunity to enunciate clear guidelines for use by the courts below in determining when municipal liability arises under the Constitution and under 42 U.S.C. §1984, for failure to train and/or supervise police officers.

I. THE DECISIONS SUPPORT THE PROPOSITION THAT AN ISOLATED INCIDENT OF THE USE OF EXCESSIVE FORCE DOES NOT RENDER A MUNICIPALITY LIABLE IN DAMAGES.

A. Decisions of this Court

Petitioner has found no opinion of this Court squarely addressing the question of when municipal liability arises in actions alleging improper training and/or supervsion of police officers resulting in injury to citizens. Earlier rulings established that a municipality may be liable for violations under 42 U.S.C. §1983. *Monell* v. *Department of Social Services, supra.*

In *Monell,* this Court held that a municipality may not be held liable under the doctrine of respondeat superior. Rather, municipal liability arises where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision *officially adopted and promulgated by that body's officers*" or is "visited pursuant to *governmental 'custom'* even though such custom has not received formal approval through the body's official decision making channels." 436 U.S. at 690-91 (emphasis supplied). This Court subsequently made clear that a local government is liable under Section 1983 only for deprivations caused by unconstitutional official policies or customs. *Polk County* v. *Dodson,* 454 U.S. 312 (1981). No decision of this Court establishes municipal liability on any other basis.

B. Recent Decisions of Federal Courts of Appeal

The recent case of *Languirand* v. *Hayden,* 717 F.2d 220 (5th Cir. 1983), is directly contrary to the decision by the Court of Appeals for the Tenth Circuit in the instant case. In *Languirand,* a police officer named Hayden, who was on the police force of defendant, City of Pass Christian, Mississippi, responded to a radio call concerning a prowler. He saw Languirand's car parked near the residence of the person who had reported the prowler. As Languirand's car started to drive away, Hayden fired his revolver at the car. The bullet struck Languirand in the base of the neck. The jury found in favor of police officer Hayden but against the City for $1,500,000. The Court of Appeals for the Fifth Circuit said:

> "The theory of the plaintiff's suit against the City was that Hayden was inadequately trained, particularly in the use of his pistol, and that the shooting of Languirand was, as this contention was phrased in the trial court's charge to the jury, 'a proximate result of the alleged policy or custom of the City of Pass Christian of placing armed officers on the streets without adequate training in the use of weapons or firearms.'" 717 F.2d at 222-223.

The Fifth Circuit reversed the judgment against the City, stating:

> "Our research discloses no decision of the Supreme Court, or of this Court, which has made any holding, or given authoritative direction, on the issue of the liability under §1983 of a governmental unit for injuries resulting from the lack of adequate training of its personnel." 717 F.2d at 225.

The Fifth Circuit reviewed all available authorities on the issue and found that the decisions were not "harmonious". However, it read *Monell* as requiring evidence of "at least a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or mishehavior was general or widespread throughout the police force", before liability could be imposed on the municipality. 717 F.2d at 227, 228.

The Fifth Circuit noted that Officer Hayden had not been given *any* formal police training whatsoever. This contrasts markedly with the facts in the instant case, where Officer Rotramel had successfully completed an intensive 18-week course (with an average grade of 91%) at an outstanding Police Academy.

At approximately the same time *Languirand* was decided by the Fifth Circuit Court of Appeals, the case of *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983), was decided by the Fourth Circuit Court of Appeals. The Fourth Circuit reached the same conclusions as the Fifth Circuit; to-wit, a single act or isolated incident is insufficient to establish municipal liabilty under Section 1983.

In *Wellington*, the action was brought by the guardian of the estate of Robert Gravelle. One Daniels, a police officer for the City of Newport News, Virginia, struck Gravelle in the head with a kel-lite flashlight. The injury resulted in body paralysis. Plaintiff predicated the action against the City of Newport News on "their failure to train and supervise properly the police department in the use of Kel-lite flashlights as weapons". 717 F.2d at 934. The result at

trial was, once again, identical to the result in the instant case: the jury found against the plaintiff and in favor of the police officer, but returned its verdict against the City in the amount of $1,500,000. The plaintiff in *Wellington* used the same "expert witness" as Tuttle used in the instant case; one Dr. Kirkham. Dr. Kirkham testified that in his opinion the Newport News Police Department was "clearly deficient" in its failure to train police officers in the use of kel-lite flashlights. His testimony in the instant case was essentially identical to his testimony in *Wellington*.

The Court of Appeals for the Fourth Circuit affirmed the District Court's decision to enter judgment notwithstanding the verdict in favor of the City of Newport News. The court stated:

> "In its most recent pronouncement on municipal liability under §1983, the [Supreme] Court made clear that a local government is liable under §1983 only for deprivations caused by *unconstitutional* official policies or customs." (emphasis by court) 717 F.2d at 935.

The Fourth Circuit noted:

> "Indeed, Gravelle could point to only the single incident during which the ward of the estate was injured on which to predicate the Police Chief's supervisory and the City's municipal liability. * * * Therefore, the district court appropriately granted the j.n.o.v. There simply was not sufficient evidence to support a finding of City policy to allow use of a dangerous instrumentality, or any encouragement by Chief Austin of such use." 717 F.2d at 937.

Also see, Herrera v. *Valentine*, 653 F.2d 1220 (8th Cir. 1981); *Hayes* v. *Jefferson County, Kentucky*, 668 F.2d 869 (6th Cir. 1982).

The decision by the Court of Appeals for the Tenth Circuit in the instant case is in clear conflict with the opinions issued by the other Federal Courts of Appeals that have addressed the "single incident" issue. The Court of Appeals for the Tenth Circuit ignored the authorities from other jurisdictions and erroneously concluded that an isolated incident is sufficient to establish a nexus between an official policy or custom of a municipality and the violation of an individual's rights.

The validity of the conclusion reached by the Tenth Circuit Court of Appeals raises important and recurring issues concerning liability of a municipality for the use of force by law enforcement officials throughout the country. The questions raised have not been addressed by this Court to date. Without clear directions from this Court concerning the appropriate test to be applied, the decision below will create additional confusion among law enforcement officers and legislators and will contribute to the growing split among the federal courts on the issue.

Petitioner contends that the test as applied by the Court of Appeals for the Tenth Circuit concerning a municipality's liability for the use of deadly force is unjustified in view of this Court's prior opinions and the weight of recent authority.

C. Other Recent Decisions Involving the Establishment of Official Policy or Custom

The scope of liability of a municipality under 42 U.S.C. §1983 has no clear contours. Justice Powell, concurring in *Monell* v. *Department of Social Services, supra,* noted:

> "Difficult questions nevertheless remain for another day. There are substantial line-drawing problems in determining 'when execution of a government's policy or custom' can be said to inflict constitutional injuries such that 'government as an entity is responsible under Section 1983.' " 436 U.S. at 713.

In *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 167-168, this Court described "custom or usage" as "persistent and widespread . . . practices," "systematic maladministration" of the laws and practices that are "permanent and well settled" and "deeply imbedded traditional ways of carrying out . . . policy." Isolated violations are not the persistent, oft-repeated, constant violations that constitute official custom or policy. *Berry* v. *McLemore,* 670 F.2d 30 (5th Cir. 1980).

In *Turpin* v. *Mailet,* 619 F.2d 196 (2d Cir. 1980), the court found that failure to discipline an officer on a single incident of illegality did not constitute an official policy where there was no prior pattern or practice of harassment and no violations were brought to the attention of the supervising entity. The lack of clear guidelines as to when a government's policy or custom can be said to inflict constitutional injury, has resulted in confusion and conflict among the various federal courts of appeal. There is also confusion in district courts. *See, Leite* v. *City of Providence,*

463 F.Supp. 585 (D.R.I. 1978); *Edmonds* v. *Dillin,* 485 F. Supp. 722 (N.D. Ohio 1980).

Petitioner submits that the question concerning the liability of a municipality for the use of excessive or deadly force is one that should be addressed by the highest court of this land. Much confusion exists among the Federal Courts of Appeal in the area of liability. The impact of the decision below is widespread. Municipalities are frequent defendants in litigation both at the State and Federal level. The decision below places in jeopardy the financial stability of local governments. This Court should review and reverse the decision below and articulate clear guidelines as to the elements necessary to establish an official policy or practice of a municipality in situations involving use of excessive or deadly force. Guidance is necessary in order to insure that a balance is maintained between the rights of the aggrieved individual citizen and the welfare of all other citizens of the municipality.

The centerpost of municipal liability, clearly etsablished by the decisions of this Court, is "that *official policy* must be the moving force of the constitutional violation in order to establish the liability of a government body under §1983." *Polk County* v. *Dodson*, 454 U.S. at 326 (emphasis supplied). The opinion by the Tenth Circuit Court of Appeals in the instant case contains no discussion whatever of the issue of official policy. Indeed, the Tenth Circuit totally ignored *Monell* and *Polk County*. Neither of these controlling cases is even cited in the Tenth Circuit's opinion. Nor did the Tenth Circuit discuss or even cite *Languirand*, *Wellington*, or the other Federal Courts of Appeal decisions on the issue.

CONCLUSION

The issues brought before this Court are of concern to each municipality in the United States. The decision reached by the Tenth Circuit Court of Appeals in the instant case simply makes the City an insurer. The scope of the protection afforded a citizen by 42 U.S.C. §1983 and its application to the conduct of a municipality are federal questions which should be resolved by this Court.

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Burck Bailey
Counsel of Record
Margaret McMorrow-Love
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
24th Floor, First National Center
Oklahoma City, Oklahoma 73102

Counsel for Petitioner

May, 1984

APPENDICES

APPENDIX A

PUBLISH

[Filed Feb. 28, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, Plaintiff-Appellee and Cross-Appellant,	)	
v.	)	
CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of the CITY OF OKLAHOMA CITY through the OKLAHOMA CITY POLICE DEPARTMENT, Defendants-Appellants and Cross-Appellees.	)	Nos. 82-2164 & 82-2175

Appeal from the United States District Court
for the Western District of Oklahoma
(D. C. No. CIV-81-679-W)

Carl Hughes, Hughes, Nelson & Gassaway, Oklahoma City, Oklahoma (Michael Gassaway, Hughes, Nelson & Gassaway, Oklahoma City, Oklahoma, with him on the brief), for Plaintiff-Appellee and Cross-Appellant Rose Marie Tuttle

Burck Bailey, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma (Warren F. Bickford IV and Margaret McMorrow-Love, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant, Cross-Appellee City of Oklahoma City

Robert E. Manchester, McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma (Susan Talbot, McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant, Cross-Appellee Officer Julian Rotramel

Michael C. Turpen, Attorney General of Oklahoma; David W. Lee, Assistant Attorney General, Chief, Federal Division, Oklahoma City, Oklahoma, for Amicus Curiae State of Oklahoma

Diane Pedicord, Oklahoma City, Oklahoma, for Amicus Curiae Oklahoma Municipal League

---

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges

DOYLE, Circuit Judge

This matter is before us pursuant to 28 U.S.C. § 1291, the regular appeals statute, and 42 U.S.C. § 1983, dealing with the violation of constitutional and statutory rights.

Rose Marie Tuttle was the plaintiff in the court below. She brought this action against the defendants, Oklahoma City and Police Officer Julian Rotramel, individually and as administratrix of the estate of her deceased husband. She alleged deprivation of her husband's statutory and constitutional rights to life and liberty, contrary to 42 U.S.C. § 1983.

The cause was tried to a jury in the United States District Court for the Western District of Oklahoma. A verdict was returned in favor of Mrs. Tuttle in the amount of $1,500,000 actual damages against the City. The jury returned a verdict in favor of the defendant Rotramel, the officer who caused the damage by shooting and killing Tuttle. The jury found in favor of Officer Rotramel because the jury found that he acted in good faith. Oklahoma City has appealed the verdict against it and Mrs. Tuttle appeals

the verdict and order to pay costs for Rotramel, the police officer.

This incident took place on October 4, 1980. The decedent William Tuttle was inside, and had been inside, the We'll Do Club in Oklahoma City. A complaint was made reporting an armed robbery in progress at the We'll Do Club. The party who called the police described the alleged robber as a 37 year old male with brown hair and glasses. The description matched Mr. Tuttle, and the parties stipulated that Mr. Tuttle actually made the call. Police Officer Julian Rotramel was dispatched to the Club, and when he arrived there was no armed robbery in progress. The bartender testified that she informed Rotramel that no robbery had occurred. Decedent attempted to leave the Club, and Officer Rotramel told him to stay where he was. Decedent disregarded Rotramel and left. Tuttle did not at any time brandish a weapon. In fact, Tuttle made no overt threat. Nevertheless, Officer Rotramel drew his gun and shot the decedent in the back. The latter was a short distance from the officer and had gone down on one knee. No weapon was found on the decedent; there was allegedly a toy gun which was said to have been found in Tuttle's possession. This was not visible to the officer, but he said that he was apprehensive that the decedent had a weapon. Decedent died from the gunshot wound very soon after the incident.

A limited number of contentions have been asserted in support of the requested reversal. These are set forth and also discussed below.

1. *The contention that the trial court erred as a result of not directing a verdict against Rotramel on the issue of liability.*

Mrs. Tuttle argues that the facts of the case fail to support Rotramel's claim of good faith, and hence the trial court should not have allowed the issue to go to the jury. We here address this issue.

The good faith defense of police officers charged with constitutional violations was first recognized by the Supreme Court in *Pierson* v. *Ray*, 386 U.S. 554 (1967). In its most recent pronouncement on the good faith defense, the Supreme Court made clear that an officer's good faith must be judged by an objective standard. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). *Harlow* reaffirmed the objective standard previously applied, but overruled earlier Supreme Court pronouncements that a subjective component existed as well. *See Wood* v. *Strickland*, 420 U.S. 308, 322 (1975) ("A school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights . . . of the student"); *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with the good faith belief, that affords a basis for qualified immunity"); *Pierson* v. *Ray*, 386 U.S. at 557 ("If the jury found that the officer reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow, even though the arrest was, in fact, unconstitutional").

An officer's good faith is not an absolute defense to charges; it is an affirmative defense that must be pleaded and proved by the defendant officer. *See Gomez* v. *Toledo*, 446 U.S. 635; *Martin* v. *Duffie*, 463 F.2d 464, 468 (10th Cir. 1972).

Under certain circumstances, the facts may negate the good faith defense as a matter of law. If the facts construed in the light most favorable to the defendant officer utterly belie his belief or the reasonableness of it, his defense should not be considered by the jury. *Butler* v. *Goldblatt Bros., Inc.*, 589 F.2d 323, 326 (7th Cir. 1978). Jury instructions on an affirmative defense should only be given if reasonably supported by the evidence.

Defendant Rotramel admitted at trial that he violated Police Department policy in shooting Mr. Tuttle. He testified however, that he believed Mr. Tuttle was a felon reaching for a gun. His belief was supported by some evidence. Officer Rotramel was responding to a report that a robbery had taken place. Apparently, Mr. Tuttle made the report, describing himself and reporting that the robber had a gun. Officer Rotramel testified that he attempted to stop Mr. Tuttle, that a struggle had ensued and that Mr. Tuttle repeatedly reached for his boot. Officer Rotramel claimed that Mr. Tuttle broke away and was again reaching for his boot, apparently retrieving a weapon, when Officer Rotramel shot him. The other witnesses to the shooting disputed these aspects of Rotramel's testimony. If the jury believed Officer Rotramel, however, it could find that he reasonably believed his response was permitted.

The trial court clearly thought the evidence was sufficient to send the issue to the jury, and the jury apparently believed Officer Rotramel's story. Inasmuch as the jury was properly instructed and since there is evidence which favors Rotramel, we cannot assume that the conclusion was improper. It is not enough that Officer Rotramel's good faith defense does not seem to be strongly supported in this case; we must decline to rule that it was inadequate as a matter of law. There was some evidence that he reasonably believed that his life was threatened and his actions were justified. Accordingly, we affirm the jury's finding that Officer Rotramel acted in good faith and thus deny the contention of Mrs. Tuttle.

2. *The contention of the City that the evidence was insufficient to justify submission to the jury.*

The City insists that the trial court erred in denying the defendant City's motions for a directed verdict and

judgment notwithstanding the verdict. Its claim is that the trial judge held the City to a standard of ordinary negligence in failing to train Officer Rotramel, rather than the allegedly required showing of gross negligence or deliberate indifference. The argument is also that a single incident of police misconduct cannot establish *grossly* negligent training, and that, in light of the single incident here, the trial court should have granted the City's motion for a directed verdict and for judgment notwithstanding the verdict.

The plaintiff-appellee Mrs. Tuttle argues that extensive evidence, and not the single incident referred to, established the grossly negligent training provided by the City. She argues that virtually all of the evidence established the necessary link between the *inadequate* training and the constitutional deprivation. *Owen* v. *Haas*, 601 F.2d 1242 (2d Cir. 1979). She claims that the trial judge recognized that gross negligence existed if the City had actual or imputed knowledge of the almost inevitable consequences that arise from completely inadequate training or supervision. See *Leite* v. *City of Providence*, 463 F.Supp. 585, 590-91 (D.R.I. 1978). We agree that Judge West properly denied the City's motions and properly submitted the issue to the jury.

3. *Appellant's further contentions that the Judge's instructions to the jury were erroneous and that the judgment should be set aside because of these alleged error or errors.*

The argument of the City, taken as a whole, is that the jury instructions did not articulate the law governing the case. Particularly, the City challenges the instruction to the jury that it could find for the plaintiff based upon a single incident of the use of force, from which the jury could infer inadequate training. The plaintiff-appellee, Mrs. Tuttle, contends that the sufficiency of the instructions is not usually to be determined by error in any single instruction, but rather by viewing the charge as a whole. *United States* v. *Jenkins*, 701 F.2d 850 (10th Cir. 1983). We regard the challenged instruction to be proper, and we consider that the instructions, taken as a whole, properly state the law of municipal liability and affirmative defenses. Apart from the killing incident, there was adequate evidence. Even the officer admitted the inadequacy of the training.

There was much complaint on the part of the City to the effect that the standard of wrong-doing submitted by the court was that of ordinary negligence. However, the instructions given do not agree with this. The instruction which addresses the applicable standard of gross negligence and other elements of the claim is as follows:

> You are instructed that the City of Oklahoma City is not liable for the deprivation of the decedent's constitutional rights solely because it hired and employed the defendant Rotramel. But there are circumstances under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.
>
> This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies, or acquiesces in the constitutional deprivation in such a manner that such constitutional deprivation can be found to result from the execution of a city's official policy or custom.
>
> In the circumstances of the case before you, the City of Oklahoma City can be found to have authorized, sanctioned, or acquiesced in any denial of the decedent's rights only if an official policy which results in constitutional deprivations can be inferred from acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the decedent.
>
> It is the plaintiff's contention that such a policy existed and she relies upon allegations that the City

is *grossly negligent* in training of police officers, in its failure to supervise police officers, and in its failure to review and discipline its officers. The plaintiff has alleged that the failure of the city to adequately supervise, train, review, and discipline the police officers constitutes *deliberate indifference* to the constitutional rights of the decedent and acquiescence in the probability of serious police misconduct. Furthermore, the policy of placing police officers on duty who were inexperienced and unqualified to act in a particular situation in applying the use of a deadly weapon constitutes deliberate indifference to the rights of the decedent.

The City, of course, has denied the plaintiff's allegations and further denies the existence of an official policy of the City of Oklahoma City which results in constitutional deprivations.

> The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of an offensive act. (Emphasis supplied.)

Contrary to the present contention of appellant, the trial judge, in outlining the standard, required proof of the City's *gross negligence*. The jury was told that inadequate training of Rotramel amounting to gross negligence and deliberate indifference to the rights of the decedent was necessary in order to deprive the decedent of his right to liberty and life without due process. In other words, the gross negligence standard was plainly set forth as it pertains to the civil rights claim under § 1983.

The instructions were not erroneous. The gross negligence-indifference standard was sufficient as instructed. As

a result the court was correct in denying dismissal relief to the City.

4. *The appellant City's argument that the alleged liability of the City is based only on training and supervision arising out of a single incident.*

The City cites case law in support of the doctrine that a single incident is not adequate evidence to establish liability for inadequate training and supervision. *McClelland* v. *Facteau*, 610 F.2d 693, 696 (10th Cir. 1979). There it is noted that a police chief could be held liable if he neglected his duty to train subordinates and establish department procedures. He must provide protection for constitutional rights and supervision to correct misconduct of which he has notice. The showing that the individual police officer may have violated the law on an isolated occasion was said not to be sufficient to raise an issue of fact for purposes of imposing liability on police chiefs for failure to train subordinates and establish department procedures that would provide protection for constitutional rights. The court added that there was a genuine issue of material fact as to whether defendant police chiefs violated the duty of supervision to correct misconduct of which they had notice.

Although *McClelland* case is entirely different from the case at bar, involving as it does police chiefs failing to supervise, the principle is much more difficult to establish than the violation here. The act here was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training, the problem which is presented. We are not to be understood as holding that there exists a guarantee that all persons whose constitutional rights are violated by municipal employees will recover from the City. Our holding requires proof of a city's violation of its duty such as to constitute deliberate indifference to the rights of its citizens. Here there was plenty of independent proof of lack of actual training. In this case the individual defendant had been on the police force for a very short period

of time; moreover, he admitted his lack of training to cope with robberies. Nevertheless, he was allowed to go in on a suspected robbery by himself. Also, his gross failure to successfully handle the problem clearly demonstrated his complete lack of training and also his lack of ability. Thus, the incident itself, as well as independent evidence, attested to the officer's lack of knowledge and ability. He claims to have considered Tuttle to be a robber but instead of pursuing him for the purpose of questioning, he fatally shot him without the least justifiable provocation. The single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training.

Our conclusion must be that this action, coupled with the clearly inadequate training, demonstrate the City's gross negligence and deliberate indifference to the rights of the decedent.

5. *The Damages Requested by Plaintiff*

The plaintiff has sought on behalf of the estate and herself the following damages from the defendants, jointly and separately. The trial court described the plaintiff's alleged damages as follows:

> $2,134.65 for burial expenses;
>
> $984.60 for hospital and medical expenses;
>
> $55,000.00 for loss of consortium and grief as the surviving spouse;
>
> $2,000,000.00 for mental anguish and physical pain suffered by the decedent prior to his death;
>
> $455,000.00 for pecuniary loss, namely loss of future earnings of the decedent, and,
>
> $250,000.00 for grief and loss of companionship of the children.

The plaintiff also sought $1,500,000.00 in punitive damages from the defendant Rotramel.

We have called attention to the numbers which were contained in the complaint of the plaintiff and which the judge mentioned in his instructions for the purposes of explaining, in part at least, how the jury arrived at the verdict returned. This court is not in a favorable position to issue a remittitur with respect to these damages.

The judgment of the district court should be and the same is hereby affirmed.

BARRETT, Circuit Judge, concurring:

I concur because I am convinced the trial court properly and adequately instructed the jury. Even so, I am at a loss to ascertain the basis for the jury's obvious finding that Officer Rotramel was so lacking in training to cope with robberies that such constituted *proof* of Oklahoma City's violation of its duty to train Officer Rotramel to the extent that, as the opinion pinpoints it, it amounted to Oklahoma Ciy's "deliberate indifference to the rights of its citizens."

I have not been able to ascertain what facts the jury relied on to render Officer Rotramel's actions unreasonable. The factual background, as I view it, consists of the false call placed by Mr. Tuttle about the robbery at the Club involving an armed person who met his description, Officer Rotramel's immediate confrontation with Mr. Tuttle upon entering the Club, Rotramel's identification of Tuttle as the reported armed robber, Rotramel's testimony that he saw Tuttle reach down at which time Tuttle was ordered to stay put, Tuttle's hurried exit from the Club in the darkness with Officer Rotramel in pursuit, the fatal shooting by Rotramel when he observed Tuttle bent down near a vehicle and reaching for that which Rotramel believed to be a gun, and finally the discovery of a toy pistol on Mr. Tuttle's person following the shooting. Beyond this, I have not been enlightened with the factual basis of Oklahoma City's "deliberate indifference" in the context of the facts of this case.

APPENDIX B

[Filed June 7, 1982]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, Plaintiff,	)	
vs.	)	CIV-81-679-W
CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of the City of Oklahoma City through the Oklahoma City Police Department, Defendants.	)	

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Lee R. West District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, take nothing by way of her claims against the defendant, Julian Rotramel, and that said defendant recover of the plaintiff his costs of the action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, deceased, recover of the defendant the City of Oklahoma City, the sum of One Million Five Hundred Thousand Dollars ($1,-

500,000.00), with interest thereon at the rate provided by law, and her costs of the action.

DATED at Oklahoma City, Oklahoma, this 7th day of June, 1982.

(s) *Lee R. West*
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET 6-7-82

Office-Supreme Court, U.S.
FILED
JUN 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1919

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Carl Hughes
Counsel of Record

HUGHES, NELSON & GASSAWAY
1501 N. Classen, Suite 200
Oklahoma City, Oklahoma 73106
(405) 528-2300

Attorneys for the Respondent

June, 1984

PARTIES IN THE COURT BELOW

Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, was Plaintiff below, Appellee and Cross-Appellant in the United States Court of Appeals for the Tenth Circuit. The City of Oklahoma City and Officer Julian Rotramel were Defendants below. The City of Oklahoma City was Appellant in the Tenth Circuit and Officer Rotramel was Cross-Appellee in the Tenth Circuit. Officer Rotramel is not involved in this Petition for Certiorari.

TABLE OF CONTENTS

	PAGE
Statute Involved in this Case	1
Concise Statement of the Case	2
Summary of Argument	4
Argument	5
Conclusion	10

Certificate of Service follows Memorandum Brief.

TABLE OF AUTHORITIES

Cases	PAGE(S)
Languiran v. *Hayden*, 717 F.2d 220 (5th Cir. 1983)	4-5
Liete v. *City of Providence*, 463 F.Supp. 585 (D.C. R.I. 1978)	8-9
McClelland v. *Facteau*, 610 F.2d 693 (10th Cir. 1979)	7
Monnel v. *Department of Social Services of the City of New York*, 346 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611	4
Owen v. *City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398 (1980)	7
Owens v. *Haas*, 601 F.2d 1232 (2d Cir. 1979), *cert. den.*, 440 U.S. 980, 100 S.Ct. 483, 162 L.Ed.2d 407 (1979)	8, 9
Rizzo v. *Goode*, 423 U.S. 362, 46 L.Ed.2d 561	8
Wellington v. *Daniels*, 717 F.2d 932 (4th Cir. 1983)	5
United States Code	
42 U.S.C. §1983	1

No. 83-1919

In the
Supreme Court of the United States
OCTOBER TERM, 1983

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

STATUTE INVOLVED IN THIS CASE

This case involves 42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

R.S. §1979; Pub. L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1984.

CONCISE STATEMENT OF THE CASE

Petitioner's "Statement" relates the facts in the light most favorable to Petitioner and leaves out many material facts. William Adam Tuttle was shot in the back by a rookie officer, riding alone without supervision under a custom that allowed rookies to ride alone despite a formal policy requiring them to ride with a master patrolman for the first year of their actual sevice.

As stated by the Tenth Circuit (Petitioner's Appendix, page 9a):

> "Here there was plenty of independent proof of lack of actual training. In this case the individual defendant had been on the police force for a very short period of time; moreover, he admitted his lack of training to cope with robberies. Nevertheless, he was allowed to go in on a suspected robbery by himself. Also, his gross failure to successfully handle the problem clearly demonstrated his complete lack of training and also his lack of ability. Thus, the incident itself, as well as independent evidence, attested to the officer's lack of knowledge and ability. He claims to have considered Tuttle to be a robber but instead of pursuing him for the purpose of questioning, he fatally shot him without the least justifiable provocation. The single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training.
>
> Our conclusion must be that this action, coupled with the clearly inadequate training, demonstrates the City's gross negligence and deliberate indifference to the rights of the decedent."

Generally, Petitioners have taken substantial liberty with the facts of the case in terms of construing them in

the light most favorable to the City. Patrons in the club indicated that when the officer entered the club and made inquiry about an alleged armed robbery he was told that nothing was going on and that everyone was having a good time. Nothing out of the ordinary happened. Witnesses in the club also testified that Tuttle made no suspicious movements, that is he did *not* bend towards his feet and continue to try to squirm loose from the officer and leave the club. He did go past Rotramel and out the door of the club.

Upon going past Officer Rotramel and out the door, Rotramel whirled, kicked the door open, drew his gun and fired at Tuttle in one continuous motion. Rotramel admitted he *never* saw any weapon. Judging by the location it appeared Tuttle tripped on the curb. The bullet trajectory negated Rotramel's claim that decedent had jumped up.

After Tuttle was shot in the back his boot was searched by Officer Riley Lennox. Officer Lennox found nothing in the boot. While Tuttle was still alive and on the scene his wife was contacted and arrived at the scene. Officers refused to allow her to visit with or talk to her husband and kept her locked in the back of a patrol car. From the time he was searched until the time his boot was removed at Baptist Medical Center, Tuttle was continuously under the control of officers. When his boot was removed *at the hospital* a toy water pistol miraculously fell to the floor. Tuttle lived and suffered approximately one hour and twenty-two minutes after the shooting. The police would not release Mrs. Tuttle to be with her husband. They took her to the central station and questioned her last. When she arrived at the hospital her husband was dead. Did they need time to regroup and plant the toy pistol?

Rotramel's training was severely deficient. He had 24 minutes of training in how to respond to an armed robbery in progress and weeks of training in how to fire his weapon. Expert testimony established these and other deficiencies and established them directly in the light of appropriate constitutional standards. The expert's testimony, standing alone, is sufficient to establish liability.

SUMMARY OF ARGUMENT

1. In *Monnel* v. *Department of Social Services of the City of New York*, 346 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, this Court established (a) liability for municipalities under Section 1 of the Civil Rights Act (42 U.S.C. §1983), (b) that Section 1 is to be broadly construed and (c) that municipalities could be sued when an action pursuant to official policy (or custom without formal approval) caused an employee to violate another's constitutional rights.

2. Policies and customs of the Oklahoma City Police Department violated William Adam Tuttle's rights. He was shot in the back by an undertrained, unsupervised rookie officer, riding alone as per custom contrary to formal policy, responding without a partner, without a backup, into a blind building where nothing was actually going on. His reactions were grossly improper which graphically illustrated his training deficiencies.

3. The jury was fully instructed on the law as it applied to this case and returned a verdict in favor of the Plaintiff below.

4. There is no conflict between the Circuits. In *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983), the Fifth

Circuit held there was no custom or policy established by the evidence. In the instant case the customs and policies were clearly established and the problems exacerbated by the officer's actions. In *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983), the complaint was a failure to implement a policy as opposed to the actual policies and customs employed by the City of Oklahoma City.

5. The standard which the City of Oklahoma City seeks to implement is so restrictive as to amount to no liability at all. As they read *Monnel* in order to establish liability against the municipality a plaintiff would have to prove (a) a policy or custom which was *per se* unconstitutional, (b) injury or death, (c) that the municipality had notice of the constitutional deficiency and (d) that it had happened on other occasions. This standard is not being applied in the Circuits and does not justify consideration herein.

ARGUMENT

As noted by the Tenth Circuit, Officer Rotramel actually admitted he committed a judgment error and confessed that he shot Mr. Tuttle while acting only under suspicion; no felony had been committed and that the shooting occurred because he had not been properly trained. He admitted deficient training in the following, among other areas:

(a) How to respond to an armed robbery in progress, while patroling alone.

(b) How to properly enter the type of building involved.

(c) Whether to wait for a backup unit on this type of call.

(d) How to secure a potential armed robbery situation.

(e) How to determine entrance priority in an armed robbery situation.

(f) How to apprehend a fleeing suspect.

He further admitted he could and should have been given training on the specific situation he faced on the evening in question and that if he had been trained properly decedent would probably be alive today.

At the time of the shooting the City of Oklahoma City had a rule/regulation that required rookie officers to be under the direct supervision of a master patrolman for one year. Petitioner did not follow its own policy and allowed Officer Rotramel to patrol alone and on his own, without sufficient safeguards to insure that he was ready for this type of activity. Expert testimony established this policy as being grossly deficient.

Expert testimony also indicated:

(a) That this incident was one of the worst departures from acceptable police conduct ever investigated by this veteran expert.

(b) The conduct was far beyond gross negligence but instead reached criminal culpability.

(c) The shooting could have been prevented by proper training and supervision.

(d) That Officer Rotramel's action and conduct were due to improper training and that the training was so grossly inadequate and reckless that the shooting was the inevitable consequence thereof, hence that knowledge was imputed to the City.

(e) The shooting amounted to a "curb-side execution".

The Tenth Circuit agreed. In rejecting the City's argument now presented here, the court distinguished the City's principal case, *McClelland* v. *Facteau*, 610 F.2d 693 (10th Cir. 1979), and noted (Petitioner's Appendix, page 9a):

> "Although *McClelland* case is entirely different from the case at bar, involving as it does police chiefs failing to supervise, the principle is much more difficult to establish than the violation here. The act here was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training, the problem which is presented. We are not to be understood as holding that there exists a guarantee that all persons whose constitutional rights are violated by municipal employees will recover from the city. *Our holding requires proof of a city's violation of its duty such as to constitute deliberate indifference to the rights of its citizens.* Here there was plenty of independent proof of lack of actual training." (Emphasis added)

The proof in the trial court substantiated the City's violation of its duty, as noted by the Tenth Circuit, such as to constitute deliberate indifference to the rights of its citizens. *Owen* v. *City of Independence, Missouri*, 445 U.S. 622, 100 S.Ct. 1398 (1980), made it clear that liability against municipalities in a civil rights case, may be based upon a single incident, and that the requirements of "policy" and "custom" do not necessitate proof of a long-standing practice.

In *Owens* v. *Haas*, 601 F.2d 1232 (2d Cir. 1979), *cert. denied*, 440 U.S. 980, 100 S.Ct. 483, 162 L.Ed.2d 407 (1979), the Court held that although there must be some causal link between the City's failure to train and the violation of constitutional rights, a single, brutal incident may be sufficient to create the causal link.

The brutality of the instant case is not contested.

The causal link in the case at bar is also present. Rotramel not only admitted that his training was inadequate, but stated that the shooting occurred because of his lack of training. Expert testimony further developed the causal link.

The Court, in *Owens* v. *Haas, supra*, went on to state that a plaintiff did not have to endure a pattern of past police misconduct before he might obtain a judgment under a cause of action for civil rights violations. If there was any evidence that the municipality had actual or imputed knowledge of the almost inevitable consequences that arise from grossly inadequate training and/or supervising of a police force, then liability would exist. That of course is present here where the City, without safeguards, allows its rookie officers on the street, without backup and without training as to how to handle an armed robbery.

In the case of *Liete* v. *City of Providence*, 463 F.Supp. 585 (D.C. R.I. 1978), the court, in relying upon *Rizzo* v. *Goode*, 423 U.S. 362, 46 L.Ed.2d 561, stated:

> "Although a city cannot be held liable for simple negligent training of its police force, the city citizens do not have to endure a pattern of past police misconduct before they can sue the city under Section 1983. If a municipality completely fails to train its police force, or trains its officers in a reckless or grossly negligent manner so that future police misconduct is almost inevitable, the municipality exhibits a 'deliberate indifference' to the resulting violation of a citizen's constitutional rights. In such case, the municipality may fairly be determined as acquiescing in and implicity authorizing such violations. . . . If the Plaintiff's injury results from this complete lack of training or grossly inadequate training of a police force, such an injury was not the result of mere negligence, but the result of deliberate and conscious indifference by the city."

As established by eyewitnesses, expert testimony, the officer himself and the Tenth Circuit's opinion, the evidence was sufficient.

This is essentially a sufficiency of the evidence case. The Tenth Circuit held (Petitioner's Appendix, page 6a):

> "The Plaintiff-Appellee Mrs. Tuttle argues that extensive evidence, and not the single incident referred to, established the grossly negligent training provided by the City. She argues that virtually all of the evidence established the necessary link between the *inadequate* training and the constitutional deprivation. *Owens* v. *Haas*, 601 F.2d 1242 (2d Cir. 1979). She claims that the trial judge recognized that gross negligence existed if the City had actual or imputed knowledge of the almost inevitable consequences that arise from completely inadequate training or supervision. See *Liete* v. *City of Providence*, 463 F.Supp. 585, 590-91 (D.R.I. 1978). We agree that Judge West properly denied the City's motions and properly submitted the issue to the jury." (Emphasis Court's)

The evidence was and is sufficient.

CONCLUSION

Respondent submits and concludes that the Petition for Writ of Certiorari should be denied in this case.

Respectfully submitted,

Carl Hughes
Counsel of Record

HUGHES, NELSON & GASSAWAY
1501 N. Classen, Suite 200
Oklahoma City, Oklahoma 73106
(405) 528-2300

Attorneys for the Respondent

June, 1984

CERTIFICATE OF SERVICE

I hereby certify that Service of the foregoing Memorandum in Opposition to Petition for a Writ of Certiorari was made this _____ day of June, 1984, by depositing three (3) copies of the same, with postage fully prepaid, to the following:

Burck Bailey
24th Floor
First National Center
Oklahoma City, Oklahoma 73102
Counsel for Petitioner

All parties required to be served, have been served.

_____

Carl Hughes

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1919

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE CITY OF OKLAHOMA CITY,

Petitioner,

vs.

ROSE MARIE TUTTLE,

Respondent.

BRIEF OF THE STATE OF OKLAHOMA AMICUS CURIAE IN SUPPORT OF THE PETITIONER

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE *
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL DIVISIONS

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

* Counsel of Record

November, 1984

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF THE AMICUS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 5

WHERE THE EVIDENCE REVEALED THAT WHERE THERE WAS NO UNCONSTITUTIONAL POLICY OR CUSTOM, NO SUPERVISORY PARTICIPATION IN THE ALLEGEDLY ILLEGAL ACTS OF AN INDIVIDUAL OFFICER AND NO PRIOR NOTICE OF IMPROPER CONDUCT OR INADEQUATE TRAINING OF THE OFFICER OR ANY OFFICER, THE IMPOSITION OF LIABILITY AGAINST THE CITY WAS IMPROPER AND LEGALLY UNJUSTIFIED. 5

Cases Cited

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 16, 20

Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981) 27

Bell v. Wolfish, 441 U.S. 520 (1979) 31

Page

Bellamy v. Bradley, 729 F.2d 416 (6th Cir. 1984) 28

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984), rehearing en banc, 735 F.2d 861 (5th Cir. 1984) 16, 24-25

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 6, 25

Crinder v. City of Muskogee, et al., No. 83-48-C (E.D. Okl.) 11

Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974) 7, 18

Estelle v. Gamble, 429 U.S. 97 (1976) 30, 31

Fayle v. Stapley, 607 F.2d 858 (9th Cir. 1979) 28

Garrett v. Rader, et al., No. CIV-83-135-R (W.D. Okl.) 12

Gehrig v. The City of Oklahoma City, No. CIV-83-1618-W (W.D. Okl.) 11

Gilmere v. City of Atlanta, Ga, 737 F.2d 894 (11th Cir. 1984) 25, 29-30

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 13-14

Page

Hays v. Jefferson County, Kentucky, 668 F.2d 869 (6th Cir. 1982) 22

Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981) 18, 19

Ingraham v. Wright, 430 U.S. 651 (1977) 31

Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976) 7, 18

Knox, et al. v. Vaughn, et al., No. CIV-82-1515-W (W.D. Okl.) 11

Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) 23-24

Losch v. Borough of Parkesburg, Pa., 736 F.2d 903 (3d Cir. 1984) 27

Marchant v. City of Little Rock, Ark., 741 F.2d 201 (8th Cir. 1984) 28

McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) . . . 7, 8, 18

McKee v. Heggy, 703 F.2d 479 (10th Cir. 1983) 19

McLaughlin v. City of LaGrange, 662 F.2d 1385 (11th Cir. 1981) 26-27

Page

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 15-16, 17, 30

Monroe v. Pape, 365 U.S. 167 (1961) 20

Owen v. City of Independence, 445 U.S. 622 (1980) 21, 32

Polk County v. Dodson, 454 U.S. 312 (1981) 15, 17

Ramsey v. Meachum, No. CIV-83-2285-W (W.D. Okl.) 12

Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984) 27

Sims v. Adams, 537 F.2d 829 (5th Cir. 1976) 20

Smith v. City of Oklahoma City, 696 F.2d 784 (10th Cir. 1983) 18

Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984) 31

Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980) 27

Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir. 1984). 5, 6, 17

Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984) 25

Page

Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) 24

Whitehurst v. Wright, 592 F.2d 834 (5th Cir. 1979) 20

Williamson v. Rader, et al., No. CIV-83-162-E (W.D. Okl.) 12

Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981) 18

Other Authorities Cited

Daily Oklahoman, May 9, 1983, p. 2 13

Note, Civil Rights: Municipal Liability Under 42 U.S.C. § 1983 for the Training, Supervision, and Control of Employees, 22 Washburn L. J. 121 (1982) 23

Note, Developments in the Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977) 20

Note, Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy", 29 Wayne L. Rev. 1225 (1983) 14

Page

Note, Simple Negligence Insufficient to Support Liability of High Police Officials and Municipalities for Inadequate Training, Supervision and Control of Individual Officers Under 42 U.S.C. § 1983 or Directly Under the Fourteenth Amendment to the United States Constitution, 51 Cincinnati L. Rev. 484 (1982) 23

No. 83-1919

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE CITY OF OKLAHOMA CITY,

Petitioner,

vs.

ROSE MARIE TUTTLE,

Respondent.

BRIEF OF THE STATE OF OKLAHOMA AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The State of Oklahoma, by Michael C. Turpen, Attorney General, submits its amicus curiae brief in support of the Petitioner, the City of Oklahoma City, in the above-entitled cause, pursuant to Sup. Ct. R. 36.4.

INTEREST OF THE AMICUS

The Attorney General has filed this amicus brief due to the grave consequences this judgment will have, if upheld, upon municipalities and all supervisory personnel who face the possibility of being subjected to federal jury trials and judgments under 42 U.S.C. § 1983 based upon an allegation of inadequate training or supervision of an employee who commits a single unconstitutional act.

SUMMARY OF ARGUMENT

A jury verdict of $1,500,000.00 in actual damages has been imposed upon the City of Oklahoma City based upon a theory that the City had been "grossly negligent" and been guilty of "deliberate indifference" in the training of an individual police officer. The evidence revealed only one incident of alleged misconduct by the officer.

There was no showing that the officer had been engaged in improper behavior previously, and no proof that any other officer had been inadequately trained.

There was no evidence that the officer acted pursuant to a city policy or custom. In fact, the officer admitted that he violated city policy by his actions, and the plaintiff's own expert witness admitted that the city's policy with respect to the use of deadly force was constitutional.

Since the evidence demonstrated that the officer's action was merely an isolated incident of an individual officer, it was error to impose liability under 42 U.S.C. § 1983 upon his employer, the City of Oklahoma City. The legislative history of § 1983 makes clear that superiors are to be held liable under this statute only if the official policy is

the moving force or if the act is undertaken in accordance with prevailing custom.

The United States Court of Appeals for the Tenth Circuit is virtually alone in its holdings that municipalities or supervisors can be held liable for the actions of a single officer who has been inadequately trained. The better rule, and one consistent with the principles established by the Supreme Court, is that the actions of an officer must have been undertaken pursuant to official policy or custom or that the practices are widespread and known or should have been known to the officials before the governing authority can be held liable. This rule is the view of an overhwelming number of the Circuits and should be the rule in the Tenth Circuit as well.

Municipalities are financially unable to be responsible for each of the

torts of individual officers, and the present case is a threat to the fiscal security of all entities which employ law enforcement officers and other employees who may violate the civil rights of citizens they come in contact with.

ARGUMENT

WHERE THE EVIDENCE REVEALED THAT WHERE THERE WAS NO UNCONSTITUTIONAL POLICY OR CUSTOM, NO SUPERVISORY PARTICIPATION IN THE ALLEGEDLY ILLEGAL ACTS OF AN INDIVIDUAL OFFICER AND NO PRIOR NOTICE OF IMPROPER CONDUCT OR INADEQUATE TRAINING OF THE OFFICER OR ANY OFFICER, THE IMPOSITION OF LIABILITY AGAINST THE CITY WAS IMPROPER AND LEGALLY UNJUSTIFIED.

In the present case, reported below as Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir. 1984), the Tenth Circuit has upheld the imposition of a judgment in the amount of $1,500,000.00 in actual damages against the City of Oklahoma City (hereinafter referred to as the "City") based upon a single, iso-

lated act of an individual police officer.[1]

The award was based upon instructions which allowed the jury to impose liablity for the City's "gross negligence" and "deliberate indifference" with respect to the training of Officer Rotramel, the officer involved in the shooting. The Tenth Circuit rejected the contention that a pattern, custom or policy of unconstitutional practices must be shown before a municipality can be held liable, stating, "[t]he single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training." 728 F.2d at 461.

---

[1] Incredibly, no punitive damages were included in this amount, and should not have been, due to the Supreme Court case of City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

This theory of liability imposed upon Oklahoma City appears to be based upon previous Tenth Circuit Court of Appeals cases. McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979); Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976); and Dewell v. Lawson, 489 F.2d 877 (10th Cir. 1974). In those cases it was held that police chiefs, supervisors and, inferentially, municipalities, can be held liable under 42 U.S.C. § 1983 for a single act of an individual police officer if it can be shown that the officer was not adequately trained or supervised.

In McClelland, the Chief of the New Mexico State Police Department and the Chief of the Farmington City Police Department presented affidavits in support of their summary judgment motions which demonstrated that adequate training had occurred and that departmental procedures then in effect would have secured

the plaintiff's rights if they had been followed. However, the Tenth Circuit held that, if the plaintiff could counter with evidence that the training or procedures were defective, then summary judgment would be inappropriate. 610 F.2d at 697.

These holdings have severe consequences for all persons and entities which have training and supervisory responsibilities with regard to public employees. All that is required of any plaintiff is that he or she raise an issue of fact concerning the training that an individual officer received, and the municipality and the supervising officers must face a federal jury trial, even if the subordinate officer was guilty of an improper action on a single, isolated occasion.

The dangers of such a rule are obvious. A large city such as Oklahoma

City, which trains hundreds of officers each year and each of whom may stay on the force for twenty years, must now be responsible for the training of each officer for the duration of his or her career.

Furthermore, this case demonstrates how a municipality, rather than the offending officer, will be likely to end up holding the bag when blame is assessed. In his deposition, Officer Rotramel stated repeatedly that he had not been properly trained to handle the situation with which he was confronted (Tr. 114, 120, 123, 124, 126). It is inevitable that an officer who is being sued for millions of dollars will seek to exculpate himself by claiming that he had not been properly trained by the city to handle the situation he faced. Inevitably, the jury sympathy will likely be toward the officer and the city will

bear the brunt of the blame, as the present case demonstrates.

Not only are municipalities placed in jeopardy by the present case. The holding herein means that every chief of police, training officer, and supervisor faces liability for the training and supervision of every officer who passes through the training academy. It appears to be manifestly unfair that these persons must guarantee that every officer he or she has taught has been adequately trained, particularly considering the number of trainees which go through the academy.

The impact of the judgment in the present case was immediate in Oklahoma. After the judgment in the present case was rendered, the Cities of Muskogee and Stillwater were sued with actions alleging inadequate training of officers in-

volved in shootings.[2] In the Stillwater case, the Chief of Police of Stillwater was forced to go through a jury trial concerning the shooting death by one officer based upon the allegation that he had been improperly trained and supervised.

Nor have § 1983 lawsuits based on allegedly inadequate training and supervision been limited to police actions. The superintendent of a state training school for retarded children in Oklahoma faces two § 1983 lawsuits surrounding

---

[2] Crinder v. City of Muskogee, et al., No. 83-48-C (E.D. Okl.); Knox, et al. v. Vaughn, et al., No. CIV-82-1515-W (W.D. Okl.). The City of Oklahoma City was sued again under the same principle in Gehrig v. The City of Oklahoma City, No. CIV-83-1618-W (W.D. Okl.).

the deaths of children in the institutions.[3] In both lawsuits the superintendent is alleged to have failed to provide adequate training to the persons who were responsible for the care of the children.[4]

The hardships confronting supervisory personnel who must endure the onus and stigma of a federal jury trial every time it is alleged that one of his or

---

[3] Garrett v. Rader, et al., No. CIV-83-135-R (W.D. Okl.); Williamson v. Rader, et al., No. CIV-83-162-E (W.D. Okl.). In both lawsuits motions to dismiss the superintendent have been overruled.

---

[4] The state director of the prison system has also been sued over his allegedly defective training of a guard who supposedly failed to properly report an altercation between two inmates. Ramsey v. Meachum, No. CIV-83-2285-W (W.D. Okl.)

her employees has not been adequately trained is apparent. The aforementioned Chief of Police of Stillwater, Oklahoma, who was exonerated by the jury with regard to a shooting by one of his officers, stated the matter succinctly, as reported by the Daily Oklahoman:

> "'It makes you wonder why do people accept these jobs,' said Chief [Hillary] Diggs, who had never been sued before in his 30 years on the force. 'Everytime a patrol car rolls out of here, I'm standing in line to be sued along with an officer.'" The Daily Oklahoman, May 9, 1983, p. 2.

The Attorney General respectfully submits that something more than a mere allegation of improper training should be required before municipalities and supervisory personnel are subjected to the rigors of federal jury trials. The Supreme Court has shown increasing sensitivity toward the burdens imposed upon public officials by federal lawsuits. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court observed:

". . . [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty--at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' . . ." 457 U.S. at 814.

The Attorney General contends that an allegation of negligence in training or supervision is not sufficient to impose federal civil rights liability on municipalities or supervisory personnel.

For a municipality or other supervisory authority to be liable under § 1983, the act must have been undertaken pursuant to "official policy" or "custom." See, Note, Municipal Liability Under Section 1983: The Failure to Act as "Custom or Policy", 29 Wayne L. Rev. 1225 (1983).

With regard to what constitutes "official policy," in Polk County v. Dodson, 454 U.S. 312 (1981), this Court held that a claim had not been stated against a county board of supervisors where the plaintiff alleged that his public defender had injured him while acting pursuant to their rules and procedures. The Court noted:

". . . In Monell v New York City Dept. of Social Services, supra, we held that official policy must be 'the moving force of the constitutional violation' in order to establish the liability of a government body under § 1983. Id., at 694 . . . See Rizzo v Goode, 423 US 362, 370-377 . . . (1976) (general allegation of administrative negligence fails to state a constitutional claim cognizable under § 1983). . . ." 454 U.S. at 326.

The Could held that the plaintiff failed to state a federal claim when "he failed to allege that this deprivation was caused by any constitutionally forbidden rule or procedure." 454 U.S. at 326.

In Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), the Court held:

"We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. . . ." 436 U.S. at 694.

In defining custom, the Supreme Court in Monell used the definition set forth in Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). There the Court defined the term "custom" as "persistent and widespread . . . practices" or practices that are "permanent and well settled" or "deeply embedded traditional ways of carrying out . . . policy." 398 U.S. at 167-168. See also, Bennett v. City of Slidell, 728 F.2d 762, 768 (5th Cir. 1984); rehearing en banc, 735 F.2d 861 (5th Cir. 1984).

In the present case, the City's policy with regard to the use of deadly force was proper, as even the Respon-

dent's expert witness conceded (Tr. 266). The Tenth Circuit in its opinion noted that Officer Rotramel "admitted at trial that he violated Police Department policy in shooting Mr. Tuttle." 728 F.2d at 458-459. Therefore, the official policy as set forth by the city's regulations concerning the use of deadly force was not the "moving force of the constitutional violation," a requirement for § 1983 liability as stated in Polk, supra, and Monell, supra.

With regard to "custom," since the evidence revealed no other incidents of police misconduct resulting from an alleged lack of training, it is obvious that there were no "persistent and widespread . . . practices" for which the City should be held to be liable under § 1983.

Paradoxically, other Tenth Circuit cases seem to follow this principle and, thus, conflict with the opinion in the

present case and those in McClelland v. Facteau, supra; Kite v. Kelley, supra; and Dewell v. Lawson, supra. In Smith v. City of Oklahoma City, 696 F.2d 784 (10th Cir. 1983), the Tenth Circuit, following the holdings of the Supreme Court, itself stated:

> ". . . Unless a municipality has a policy or custom that was the cause of the constitutional deprivation, the municipality will not be liable under section 1983 for the actions of its employees. . . ." 696 F.2d at 786.

See also, Wise v. Bravo, 666 F.2d 1328, 1335 (10th Cir. 1981) ("There is no allegation that the City 'acted' through its policies, formally or informally adopted, to deprive Wise of any constitutional rights").

In Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981), the Tenth Circuit held that dismissal of an action against a state district court judge was proper where the plaintiff alleged that a court clerk had interfered with his legal

mail. The Court noted that "[a]n isolated instance of a violation of constitutional rights by a subordinate is incapable of rising to an issue regrding the liability of a superior under § 1983." 644 F.2d at 854.

However, on other occasions, the Tenth Circuit seems to revert to the "single incident" rule stated above in Tuttle. In McKee v. Heggy, 703 F.2d 479, 483 (10th Cir. 1983), the Circuit, in a case involving the possible liability of the chief of police of Oklahoma City, held:

> "Thus, defendant Heggy [the chief of police] is liable to Mr. McKee only if Mr. Heggy participated or acquiesced in Mr. McKee's deprivation or if he inadequately trained or supervised the officers who did." (Emphasis added)

The history of § 1983 indicates that it was meant to combat settled practices which denied citizens of their federally protected rights and systematic deprivations of such. See, Note, Developments

in the Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1137, 1153-56 (1977); Adickes v. S. H. Kress & Co., supra, 398 U.S. at 167-68; Monroe v. Pape, 365 U.S. 167, 237-38 (1961) (Frankfurter, J., dissenting).

The requirement that a city act pursuant to its "policies or custom" before liability can be imposed necessarily implies that the municipality or supervisory personnel have notice of previous improper conduct. In the present case, Oklahoma City has been found liable based on allegedly inadequate training of which it had no notice. Cf., Whitehurst v. Wright, 592 F.2d 834, 838-39 (5th Cir. 1979) (mayor improperly dismissed from § 1983 lawsuit where no showing that mayor had knowledge of policeman's propensity for violence); and Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976) (supervisory breach of duty exists for failure to control po-

liceman's "known propensity for improper use of force.").

In Owen v. City of Independence, 445 U.S. 622 (1980), the Supreme Court held that a municipality cannot invoke the defense of good faith in a § 1983 action. However, in a dissent, Justice Powell noted that the framers of § 1983 objected to and defeated the Sherman Amendment, which would have imposed liability "without any showing that a municipality knew of an impending constitutional deprivation." 445 U.S. at 673. Justice Powell observed that the "42d Congress refused to hold municipalities vicariously liable for deprivations that could not be known beforehand." 445 U.S. at 674-75.

The Attorney General of Oklahoma contends that, in the present case, where Oklahoma City's policy was constitutional, where there was no supervisory participation in any alleged illegal

conduct, where the city had no notice of any previous illegal conduct by the officer or that its training was in any way inadequate, an assessment of liability against the city was unjustified.

In Hays v. Jefferson County, Kentucky, 668 F.2d 869, 873 (6th Cir. 1982), the Sixth Circuit reversed a jury verdict against a county and a police mayor, stating that "the case law has limited § 1983 so as not to reach isolated instances where a negligent failure to adequately supervise, train, or control was involved." The Court further observed:

> "Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only where there is esentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, e.g., Leite v. City of Providence, 463 F.Supp. at 590, or would properly be characterized as substantially certain to result, Rheuark v. Shaw, 477 F.Supp. 897 (N.D. Texas 1979)." 668 F.2d at 874.

See also, Note, Civil Rights: Municipal Liability Under 42 U.S.C. § 1983 for the Training, Supervision, and Control of Employees, 22 Washburn L. J. 121 (1982); Note, Simple Negligence Insufficient to Support Liability of High Police Officials and Municipalities for Inadequate Training, Supervision and Control of Individual Officers Under 42 U.S.C. § 1983 or Directly Under the Fourteenth Amendment to the United States Constitution, 51 Cincinnati L. Rev. 484 (1982).

In Languirand v. Hayden, 717 F.2d 220, 229 (5th Cir. 1983), a police shooting case, the Fifth Circuit noted that the case involved "one isolated incident in which the police chief negligently, or grossly negligently, allowed one particular inadequate officer to go on patrol." The Circuit held that this was insufficient to establish liablity, "in the absence of similar incidents in

which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force." 717 F.2d at 228.

In the present case, nothing of the sort described above was involved. The plaintiff failed to demonstrate that any other incident of improper training or supervision occurred. See also, Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983) ("Generally, a failure to supervise gives rise to § 1983 liability, however, only in those situations in which there is a history of widespread abuse.").

In Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984), rehearing en banc, 735 F.2d 861 (5th Cir. 1984) the Fifth Circuit stated:

> "A city may well have a policy with respect to police recruitment and training that is itself unconstitutional and injurious, but occasional acts of untrained policemen are not otherwise attributed to city policy or custom." 728 F.2d at 768, n. 3.

See also, Gilmere v. City of Atlanta, Ga., 737 F.2d 894, 904 (11th Cir. 1984); and Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984) (issue is whether city maintained a practice of allowing the use of excessive police force that was a persistent and widespread practice).

Other cases of this Court reinforce the viewpoint that a municipality should not be held liable for the isolated acts of individuals. For example, respondeat superior cannot be a basis for § 1983 liability. Monell v. New York City Department of Social Services, supra, 436 U.S. at 691. In Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981), in rejecting the contention that municipalities be assessed punitive damages in § 1983 actions, the Court stated that

cities should not bear the "burden of exposure for the malicious conduct of individual government employees. . . ."

In McLaughlin v. City of LaGrange, 662 F.2d 1385 (11th Cir. 1981), the Eleventh Circuit upheld the granting of a motion for summary judgment in favor of the city and the chief of police in a § 1983 lawsuit concerning police brutality. The motion was accompanied by evidence that the chief was not personally involved in the incident, "that police department rules prohibited use of unnecessary force, and that no custom existed which condoned such misconduct." 662 F.2d at 1388. The Circuit noted that "[i]n order for a municipality to be liable under section 1983 there must be some personal involvement or evidence that 'execution of a government's policy or custom, whether made by its lawmakers or by those edicts or acts may fairly be said to represent official policy,' in-

flicts the injury." 662 F.2d at 1388. See also, Rowland v. Mad River Local School District, 730 F.2d 444 (6th Cir. 1984).

This is consistent with the prevailing rule that official policy such that imposes liability under § 1983 cannot ordinarily be inferred from a single act. Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980); Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 911 (3d Cir. 1984) ("A policy cannot ordinarily be inferred from a single instance of illegality such as a first arrest without probable cause."). See also, Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981). There must be a showing that the supervisory authority encouraged the specific incident of misconduct, in some way directly participated in it or at least authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending insub-

ordinate. Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984). There is no liability where the constitutional violation was not a direct result of specific administrative policies under the control of the governmental authority. Marchant v. City of Little Rock, Ark., 741 F.2d 201, 205 (8th Cir. 1984). See also, Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979).

Furthermore, the instructions in the present case allowed the jury to assess liability based upon a single, isolated incident. At the end of Instruction 15, the jury was instructed, in part, as follows:

> "IN SUMMARY, IF YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE IN THE CASE AFTER APPLYING THESE INSTRUCTIONS THAT THE PLAINTIFF HAS PROVED HER CLAIM THAT THE DECEDENT WAS DEPRIVED OF HIS RIGHTS TO LIBERTY AND LIFE WITHOUT DUE PROCESS OF LAW AND WAS SUBJECTED TO UNREASONABLE FORCE IN HIS APPREHENSION, THEN YOUR VERDICT WILL BE FOR THE PLAINTIFF AND AGAINST THE DEFENDANTS. . . ." (Tr. 642-643)

In Instruction 18, it was stated, in part:

> ". . . FURTHERMORE, THE POLICY OF PLACING POLICE OFFICERS ON DUTY WHO WERE INEXPERIENCED AND UNQUALIFIED TO ACT IN A PARTICULAR SITUATION IN APPLYING THE USE OF A DEADLY WEAPON CONSTITUTES DELIBERATE INDIFFERENCE TO THE RIGHTS OF THE DECEDENT." (Tr. 647)

While the instructions state that Oklahoma City "cannot be held liable for simple negligence" (Instruction 18, Tr. 648), "negligence" is not defined elsewhere in the instructions.

The result reached in the present case is in direct opposition to that of a recent Eleventh Circuit case, Gilmere v. City of Atlanta, Ga., 737 F.2d 894 (11th Cir. 1984). In that case, Atlanta police officers shot and killed the decedent during an altercation. The Circuit reversed a district court judgment against the city, observing that "the City had no official policy or custom to select and train its police officers im-

properly." 737 F.2d at 903. The Court also held that the district court's finding that the police department's training of the officer had been so lacking as to constitute "gross negligence" or "deliberate indifference" was erroneous, stating:

> "'Gross negligence' or 'deliberate indifference' is simply not the proper test for adjusting a due process section 1983 claim against a municipality." 737 F.2d at 904.

The District Court in the present case, as did the district court in Gilmere, apparently adopted the "deliberate indifference" standard from the case of Estelle v. Gamble, 429 U.S. 97 (1976). In Gilmere, the Eleventh Circuit noted that Gamble "had nothing to do with municipal liability" and since Gamble precedes Monell, the Supreme Court "could easily have incorporated the 'deliberate indifference' standard into the municipal liability calculus had it wished to do so." 737 F.2d at 904.

The application of the cruel and unusual punishment standard of Estelle v. Gamble to a police shooting case is incorrect since the Eighth Amendment protects only those who have been convicted of a crime. Ingraham v. Wright, 430 U.S. 651, 671, n. 4 (1977). For example, the amendment does not protect pretrial detainees. Bell v. Wolfish, 441 U.S. 520, 535, n. 16 (1979); Thibodeaux v. Bordelon, 740 F.2d 329, 333-334 (5th Cir. 1984).

CONCLUSION

The present case has potential for great ramifications upon the functions of local government. Unless the potential for liability of municipalities, governing bodies and supervisory personnel is clarified and until adequate safeguards exist in this Court's interpretation of 42 U.S.C. § 1983, local officials face the prospect of being run through the gauntlet of a federal jury

trial every time the issue of adequacy of training and supervision is raised.

Furthermore, this case has the potential for fulfilling Justice Powell's prophecy regarding the impact that Owen v. City of Independence, supra, has upon municipal decision-making and resources. See, 445 U.S. at 665-70. Justice Powell also noted the irony in the fact that municipalities, which are now liable under § 1983 while state and federal governments are not, see, 445 U.S. at 670, n. 12, are the least able to bear the costs of such lawsuits. 445 U.S. at 670.

For the reasons stated, the Attorney General of the State of Oklahoma joins with the Petitioner, the City of Oklahoma City, in requesting this Court to

reverse the judgment below entered against Oklahoma City.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL
DIVISIONS

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1919

In The

Supreme Court of the United States

October Term, 1984

THE CITY OF OKLAHOMA CITY,

Petitioner,

v.

ROSE MARIE TUTTLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CITY OF OKLAHOMA CITY, PETITIONER

BURCK BAILEY
Counsel of Record

MARGARET MCMORROW-LOVE
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
2400 First National Center
Oklahoma City, Oklahoma 73102
(405) 232-0621
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or custom of a municipality sufficient to render the municipality liable in damages under 42 U.S.C. §1983.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISION	2
STATEMENT	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
A Municipality May Not Be Held Liable for Damages Under 42 U.S.C. §1983 Absent an Established Policy or Custom with Reference to the Use of Excessive Force.	8
A. Instruction to the Jury	8
B. Decisions of this Court	10
C. Decisions of the Federal Courts	11
D. The Decision of the United States Court of Appeals for the Tenth Circuit	19
SUMMARY	22

TABLE OF AUTHORITIES

	Page
CASES:	
Adickes v. Kress & Co., 398 U.S. 144 (1970)	10
Bennett v. City of Slidell, 728 F.2d 762 (5 Cir. 1984)	14, 15
Gilmere v. City of Atlanta, Ga., 737 F.2d 894 (11 Cir. 1984)	14, 18, 20
Languirand v. Hayden, 717 F.2d 220 (5 Cir. 1983)	11, 13, 14, 15
Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978)	10, 11, 13, 16, 18, 19, 20, 21
Owen v. City of Independence, 445 U.S. 622 (1980)	11
Polk County v. Dodson, 454 U.S. 312 (1981)	11
Webster v. City of Houston, 711 F.2d 35 (5 Cir. 1983), on petition for rehearing, 735 F.2d 838 (5 Cir. 1984)	14, 15, 16, 17
Wellington v. Daniels, 717 F.2d 932 (4 Cir. 1983)	14, 15
STATUTES:	
28 U.S.C. §1254(1)	2
42 U.S.C. §1983	2, 7, 8, 9, 10, 11, 14, 16, 17, 18, 21, 22
42 U.S.C. §1985	2
42 U.S.C. §1986	2
42 U.S.C. §1988	2
70 O.S. 1981 §3311	3

No. 83-1919

In The

Supreme Court of the United States

October Term, 1984

THE CITY OF OKLAHOMA CITY,

Petitioner,

v.

ROSE MARIE TUTTLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE CITY OF OKLAHOMA CITY, PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 728 F.2d 456 (Feb. 28, 1984). The judgment of the United States District Court for the Western District of Oklahoma is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on February 28, 1984. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed on May 24, 1984, and said Petition was granted on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

o

STATUTORY PROVISION

The pertinent provisions of 42 U.S.C. §1983 are as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or any proceeding for redress."

o

STATEMENT

On May 22, 1981, Rose Marie Tuttle filed a complaint in the United States District Court for the Western District of Oklahoma naming as defendants, the City of Oklahoma City and Julian Rotramel, a police officer of the Oklahoma City Police Department. She filed suit individually and as administratrix of the estate of decedent, William A. Tuttle. The complaint sought recovery under 42 U.S.C. §§1983, 1985, 1986 and 1988.

Plaintiff charged that Oklahoma City inadequately trained its police officers. She alleged that the training provided by Oklahoma City to its officers was so poor that it amounted to a willful, wanton and malicious act constituting gross negligence. The City denied the allegations of the complaint and specifically asserted that the death of William Tuttle did not result from any official policy or custom of the City of Oklahoma City.

Officer Julian Rotramel had attended and successfully completed 18 weeks of training at the Oklahoma City Police Academy. He graduated with high marks in December of 1979. (Tr. 334, 335.) The Police Academy provided approximately 700 hours of training, although only 120 were required by Oklahoma law, 70 O.S. 1981 §3311. The courses covered a variety of topics, including the civil rights of citizens, the civil and penal codes of the City of Oklahoma City and the procedures to be followed for dealing with citizens within the geographic boundaries of the City. (Tr. 326.) Following his graduation from the Police Academy, Officer Rotramel rode for several months with a senior patrolman assigned to the different areas of Oklahoma City. During this time, he performed in a satisfactory manner. In accordance with Department policy, he was allowed then to ride "solo" in a police cruiser. (Tr. 198-201.)

On the evening of October 4, 1980, the Oklahoma City Police Department received a telephone report that an armed robbery was in progress at the "We'll Do Club," a drinking establishment. The caller described the robber as white, having brown hair, approximately 37 years old and wearing colored glasses. (Tr. 532.) The caller also reported that the robber had a gun. (Tr. 607, 608.) All such calls to the Oklahoma City Police Department are

tape-recorded. William Tuttle's wife, plaintiff herein, later identified the voice on the police department tape of the call as that of her deceased husband. (Tr. 533.) The description William Tuttle gave of the "robber" matched his own appearance. William Tuttle had quarreled with his wife that day. He had gone to the bar where he remained on and off all day and into the night, consuming alcoholic beverages. (Tr. 25.) After making the phone call, William Tuttle informed one of the patrons of the bar that he "was going to be shot that night." (Tr. 599.) Witnesses also described him as shaking and stating that nothing was wrong anymore. (Tr. 44.)

The dispatcher for the Oklahoma City Police Department sent out an all points bulletin of a robbery in progress at the We'll Do Club, and described the robber. Officer Rotramel, patrolling in the immediate vicinity, responded to the call. He arrived at the club, parked his police vehicle and entered the bar. (Tr. 537.)

The testimony of what occurred after Officer Rotramel entered the bar was in conflict. Officer Rotramel testified as follows: upon entering the bar, he observed 10 to 15 people. William Tuttle looked toward the officer and began walking towards him. Rotramel reached out, took hold of William Tuttle's arm and requested that he stay within the bar. When Tuttle tried to walk past Rotramel again, the officer requested that he "stay put" and Tuttle responded "why." The officer proceeded to question a barmaid, Vonnie Hinds. During the questioning, Tuttle attempted to bend towards his boots and continued to try to squirm loose from the officer's grip and leave the bar. (Tr. 539, 540.) Tuttle broke away from Officer Rotramel, who proceeded to order Tuttle to "halt," which

command was ignored. (Tr. 541.) Tuttle cleared the door which sprang shut in front of Officer Rotramel. Rotramel pulled his service revolver from its holster and went out the door in pursuit of Tuttle. Since Tuttle matched the description of the robber and had broken loose, Rotramel thought Tuttle was in fact the robber.

Outside the bar, Rotramel saw Tuttle in a crouched position with his hands located in or near his boot. Due to the position of the door, the patrons inside were not able to see Tuttle's actions or what occurred after he left the bar. Rotramel ordered Tuttle to halt. Tuttle started to come up from his crouched position, at which time Rotramel discharged his weapon. The officer stated that he discharged his weapon in the belief that Tuttle had recovered a gun from his boot and was preparing to use it on him and that his life was in jeopardy. (Tr. 543.)

Following the shooting, Tuttle was transported by ambulance to the Baptist Medical Center in Oklahoma City. During the course of his medical treatment, medical personnel disrobed him. When his boot was removed, a toy cap pistol fell to the cart. (Tr. 455.) He was pronounced dead at 9:22 p.m.

The trial commenced on May 28, 1982. During the course of the trial, plaintiff introduced no evidence of any prior incidents of violence or improper conduct or excessive use of force on the part of Officer Rotramel. Likewise, there was no testimony of any prior incidents of violence, misconduct, or unauthorized or excessive use of force by any officer on the Oklahoma City Police Department. The only incident brought before the jury for consideration was the discharge of a weapon by Officer Rot-

ramel on the evening of October 4, 1980, resulting in the death of William Tuttle.

During the course of the trial, extensive testimony was presented by both sides regarding the training received by Oklahoma City police officers in general and the specific training received by Officer Rotramel at the Oklahoma City Police Academy. The record is replete with examples of the detailed care given to the training of each candidate for a position of police officer with the City of Oklahoma City. The testimony as to the curriculum at the Academy revealed the extensive training Rotramel himself went through before he was allowed on the streets as an officer. Plaintiff introduced § 9.03 and § 17.01 of the Oklahoma City Police Department's Operation Manual concerning the use of firearms by law enforcement officials and the use of force in making arrests. (Tr. 90, 91.) This official policy manual provided, *inter alia*, that "a police officer is justified in using his firearm only in defense of life and instances where the suspect is armed and/or making an attempt to kill or do great bodily harm." (Tr. 92.)

Former Oklahoma City Chief of Police, Tom Heggy, testified that the Oklahoma City Police Academy had for years been rated one of the top three police academies in the Nation. (Tr. 368.) Rotramel stated that he had been trained in the policies and procedures of the Oklahoma City Police Department, and specifically trained in the provisions of paragraphs 9.03 and 17.05, concerning the use of deadly force. Rotramel testified that Tuttle "matched the description of the armed robber." (Tr. 132.) He testified:

"Q. Officer Rotramel, why did you shoot William Adam Tuttle?

A. I felt like that he had recovered a weapon and was preparing to use it on me in order to make his escape.

Q. Did you feel your life was in danger?

A. Yes, sir. I did." (Tr. 544.)

The jury returned its verdict on the evening of June 3, 1982 in favor of the plaintiff and against the City of Oklahoma City in the amount of $1,500,000. The jury returned its verdict in favor of the co-defendant, Julian Rotramel, and against the plaintiff. On June 4, 1982, the Court entered judgment pursuant to the verdicts.

The City of Oklahoma City filed a motion for Judgment Notwithstanding the Verdict on June 24, 1982, which was overruled on August 11, 1982. An appeal was brought by the City of Oklahoma City to the United States Court of Appeals for the Tenth Circuit. A cross-appeal was filed by Rose Marie Tuttle from the decision rendered by the jury in favor of Officer Rotramel. On June 28, 1984, the Court of Appeals entered its opinion affirming the judgment below. The principal issue on appeal was whether a single isolated occurrence of the use of excessive or deadly force results in municipal liability under 42 U.S.C. § 1983.

SUMMARY OF ARGUMENT

The City of Oklahoma City asserted throughout the case that it could not be held liable in damages under 42

U.S.C. § 1983 for a single isolated incident of the use of excessive force by a member of its police department. There was a complete absence of proof at trial of any prior incidents of the use of excessive force by any member of the police force. Similarly, plaintiff presented no proof of the "known" propensity of Julian Rotramel for violence.

Plaintiff focused throughout the trial on the alleged failure of the City to train Rotramel with reference to the appropriate manner of approaching and entering a "blind" building in response to a call of an armed robbery in progress. However, such evidence is irrelevant to the sole issue involved herein. The shooting incident did not occur in the bar but rather occurred on a sidewalk outside the bar after the decedent broke from the officer's grasp and ran through the door. The City of Oklahoma City asserts that the single act of Rotramel in shooting Tuttle outside the We'll Do Club does not establish an "official policy or custom" of Oklahoma City. In such instances, a municipality, such as the City of Oklahoma City, may not be held liable for damages under 42 U.S.C. § 1983.

ARGUMENT

A Municipality May Not Be Held Liable for Damages Under 42 U.S.C. §1983 Absent an Established Policy or Custom with Reference to the Use of Excessive Force.

A. Instruction to the Jury.

The trial court instructed the jury:

"... [b]ut a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an

inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." (J.App. 44).

This instruction was given with reference to the elements necessary to establish the liability of a municipality under 42 U.S.C. § 1983. Under these instructions, the jury returned a verdict against the City of Oklahoma City in the amount of $1,500,000.

The United States Court of Appeals for the Tenth Circuit affirmed the verdict against Oklahoma City. The Court stated:

"Contrary to the present contention of appellant, the trial judge, in outlining the standard, required proof of the City's *gross negligence*. The jury was told that inadequate training of Rotramel amounting to gross negligence and deliberate indifference to the rights of the decedent was necessary in order to deprive the decedent of his right to liberty and life without due process. In other words, the gross negligence standard was plainly set forth as it pertains to the civil right claim under § 1983.

"The instructions were not erroneous. The gross negligence-indifference standard was sufficient as instructed. As a result the court was correct in denying dismissal relief to the City." 728 F.2d at 460.

Thus the question: May a municipality be found liable under § 1983 on the ground that one of its police officers committed an act from which the trier of fact could infer that the officer was so inadequately trained as to constitute gross negligence or deliberate indifference on the part of the municipality? Or, must the proof show that the unconstitutional deprivation was the result of official policy or custom on the part of a municipality?

B. Decisions of this Court.

In *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), this Court determined that an analysis of the legislative history of the Civil Rights Act of 1871 compelled the conclusion that Congress did intend municipalities and other local government units to be included among the definition of persons to whom § 1983 applies.[1] 436 U.S. at 690. However, this Court held that a municipality could be held liable only where the action that is alleged to be unconstitutional implemented or executed a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or where the deprivation occurred "pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decision-making channels." 436 U.S. at 690-691.

The Court in *Monell* did not engage in an extensive discussion of what constituted an official policy or a custom of a municipality. Guidance is found in the Court's prior opinion in *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), wherein the Court determined that the custom or usage required for state involvement was not merely a practice that reflected long standing habits observed by people in a particular locality. Rather, the Court concluded that "custom or usage" as used in § 1983 means that it must have the force of law by virtue of "persistent practices" of state officials.

Following this reasoning, this Court subsequently emphasized that local governments are liable under § 1983

---

[1] States continue to enjoy immunity from suit under 42 U.S.C. § 1983 by virtue of the Eleventh Amendment.

only for deprivations caused by unconstitutional official policies or customs. *Polk County v. Dodson*, 454 U.S. 312 (1981); *Owen v. City of Independence*, 445 U.S. 622 (1980). No decision of this Court has established municipal liability on any other basis. Petitioner has been unable to find a decision of this Court addressing the issue of what constitutes custom or policy of a municipality in matters involving allegations of improper training or the use of excessive force.

C. Decisions of the Federal Courts.

Following this Court's pronouncement in *Monell v. New York City Dept. of Soc. Serv., supra*, the federal courts have struggled with the problem of formulating guidelines to determine when a municipality may be liable under § 1983. These guidelines are in considerable disarray. In *Languirand v. Hayden*, 717 F.2d 220 (5 Cir. 1983), a police officer named Hayden, who was on the police force of defendant, City of Pass Christian, Mississippi, responded to a radio call concerning a prowler. He saw Languirand's car parked near the residence of the person who had reported the prowler. As Languirand's car started to drive away, Hayden fired his revolver at the car. The bullet struck Languirand in the base of the neck. The verdict by the jury in *Languirand* was identical to the verdict in the case at bar: the jury found in favor of Police Officer Hayden but against the City of Pass Christian for $1,500,000. The theory advanced by Languirand was identical to the theory advanced by plaintiff in the instant case. That theory, as stated by the Fifth Circuit Court of Appeals, was:

> "The theory of the plaintiff's suit against the City was that Hayden was inadequately trained, particular-

ly in the use of his pistol, and that the shooting of Languirand was, as this contention was phrased in the trial court's charge to the jury, 'a proximate result of the alleged policy or custom of the City of Pass Christian of placing armed officers on the streets without adequate training in the use of weapons or firearms'." 717 F.2d at 222, 223.

The Fifth Circuit reversed the judgment against the City of Pass Christian. It found no controlling decision in making its determination:

> "Our research discloses no decision of the Supreme Court, or of this Court, which has made any holding, or given authoritative direction, on the issue of the liability under section 1983 of a governmental unit for injuries resulting from the lack of adequate training of its personnel." 717 F.2d at 225.

The Fifth Circuit reviewed all available authorities on the issue and found that the decisions were not "harmonious." The Fifth Circuit held:

> " . . . that a municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, *in the absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.*" 717 F.2d at 227, 228. (Emphasis supplied.)

The Fifth Circuit noted that Officer Hayden had not been given *any* formal police training whatsoever. This contrasts markedly with the facts in the instant case, where Officer Rotramel had successfully completed an intensive 18-week course at an outstanding police academy.

In concluding that the evidence in *Languirand* was insufficient to meet the *Monell* test, the Fifth Circuit stated:

> "There is simply no evidence that the City, or its police force, had any policy or custom of resort to weapons, or other employment of significant force, in circumstances which might be deemed improper, unnecessary, or dangerous. There was no evidence of any other incident which involved, or which anyone claimed involved, police misconduct or even any simple negligence on the part of the police. Apart from the incident in question, there was no evidence that any police officer had ever acted, or was claimed to have acted, in an improper or negligent manner, or even that any citizen had been injured, or exposed to risk of injury, in *any* incident involving the police. There was no evidence that anyone on the police force, other than Hayden, lacked sufficient skill, training, and experience to be qualified for and able to adequately perform the position he or she held. There is simply no evidence that the City had any policy or custom of placing armed officers on the streets who lacked adequate training, skill, and experience in the use of firearms.
>
> • • •
>
> "What we are dealing with here, so far as this record discloses, is one isolated incident in which the police chief negligently, or grossly negligently, allowed one particular inadequate officer to go on patrol, and this officer's inadequacies resulted in one particular incident of negligent or grossly negligent injury to a citizen. Grievous and regrettable as that incident and injury indisputably are, that does not convert this case to one of municipal policy or custom under section 1983." 717 F.2d at 228, 229.

The foregoing comments by the Fifth Circuit could apply without changing a word to the case at bar.

At approximately the same time *Languirand* was decided by the Fifth Circuit Court of Appeals, the case of *Wellington v. Daniels,* 717 F.2d 932 (4 Cir. 1983), was decided by the Fourth Circuit Court of Appeals.[2] The Fourth Circuit reached the same conclusions as the Fifth Circuit; to-wit, a single act or isolated incident is insufficient to establish municipal liability under § 1983.

In *Wellington,* the action was brought by the guardian of the Estate of Robert Gravelle. One Daniels, police officer for the City of Newport News, Virginia, struck Gravelle in the head with a Kel-lite flashlight. The injury resulted in body paralysis. Plaintiff predicated the action against the City of Newport News on "their failure to train and supervise properly the police department in the use of Kel-lite flashlights as weapons." 717 F.2d at 934. The result at trial was, once again, identical to the result in the instant case; the jury found against the plaintiff and in favor of the police officer, but returned its verdict against the city in the amount of $1,500,000. The plaintiff in *Wellington* used the same "expert witness" as Tuttle used in the instant case: one Dr. Kirkham. Dr. Kirkham

---

2 Both *Languirand* and *Wellington* were brought to the attention of the Tenth Circuit Court of Appeals. The City filed a supplemental memorandum January 19, 1984, advising the Tenth Circuit that these cases had been decided since the briefs had closed. The City also urged the Court's consideration of them during oral argument. The Tenth Circuit made no reference to the cases in its opinion herein. Thereafter, when the Fifth Circuit and the Eleventh Circuit decided *Bennett v. City of Slidell,* 728 F.2d 762 (5 Cir. 1984), on petition for rehearing, 735 F.2d 861 (5 Cir. 1984); *Webster v. City of Houston,* 735 F.2d 838 (5 Cir. 1984); and *Gilmere v. City of Atlanta, Ga.,* 737 F.2d 894 (11 Cir. 1984), they ignored the Tenth Circuit's opinion herein.

testified that in his opinion the Newport News Police Department was "clearly deficient" in its failure to train police officers in the use of Kel-lite flashlights. His testimony in the instant case was essentially identical to his testimony in *Wellington.*

The Court of Appeals for the Fourth Circuit affirmed the district court's decision to enter judgment notwithstanding the verdict in favor of the City of Newport News. The court stated:

> "In its most recent pronouncement on municipal liability under §1983, the [Supreme] Court made clear that a local government is liable under §1983 only for deprivations caused by *unconstitutional* official policies or customs." (Emphasis by Court.) 717 F.2d at 935.

The Fourth Circuit noted:

> "Indeed, Gravelle could point to only the single incident during which the ward of the estate was injured on which to predicate the Police Chief's supervisory and the City's municipal liability. . . . Therefore, the district court appropriately granted the j.n.o.v. There simply was not sufficient evidence to support a finding of City policy to allow use of a dangerous instrumentality, or any encouragement by Chief Austin of such use." 717 F.2d at 937.

The Fifth Circuit Court of Appeals has been sharply divided in two recent cases since *Languirand,* to-wit, *Bennett v. City of Slidell,* 728 F.2d 762 (5 Cir. 1984), on petition for rehearing, 735 F.2d 861 (5 Cir. 1984); *Webster v. City of Houston,* 711 F.2d 35 (5 Cir. 1983), on petition for rehearing, 735 F.2d 838 (5 Cir. 1984). The *Webster* case involved a particularly shocking episode of police misconduct. Randell Allen Webster, 17-years old, stole a van

from a Dodge dealership in Houston and led police officers on a high-speed chase. Webster eventually lost control of the van and spun to a stop. He emerged from the van and was pushed to the ground by the police officers. He had no gun and put up no resistance. One of the police officers shot Webster in the back of the head. He died later that night. The police officers agreed to use a "throw down gun" to make it appear that Webster was armed at the time he was killed. In reversing a judgment against the City of Houston under §1983, the Fifth Circuit stated:

> "Under our standard this case turns on whether the City maintained a practice of allowing the use of excessive police force that was 'a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.' If actions of city employees are to be used to prove a custom for which the municipality is liable, those actions must have occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." 735 F.2d at 842.

The five dissenting judges on the en banc rehearing in *Webster* gave *Monell* a broader reading. They stated:

> "The Supreme Court recognized it was presenting only the faintest pencil sketch of the 'full contours of municipal liability under §1983' in *Monell*. It expressly deferred 'further development of this action to another day.' Id. at 695, 98 S.Ct. at 2038. The Supreme Court's 'other day' has yet to arrive.
>
> "This Court has only begun to flesh out the skeletal contours left by *Monell*. We have taken a relatively restrained view of the breadth of both official policy

> and governmental custom. Of course, we have held a city not to be liable under §1983 where there is no evidence that the deprivations occurred as a result of the city's policy or custom. * * * Our en banc decision in *Bennett v. City of Slidell*, 728 F.2d 762 (5 Cir. 1984) concisely stated this principle: 'Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy.'" 735 F.2d at 850, 851.

The dissenters found that the evidence in *Webster* made it clear that all members of the Houston Police Department were well aware of the "throw down" custom, and yet no specific steps were taken to stop it. In short, in the view of the dissenters, there was ample evidence to prove an unconstitutional custom well-known to high ranking officials of the City of Houston. The dissenters noted that the trial court had instructed the jury that the plaintiffs had to establish by the evidence "that there existed a regular pattern of such conduct" so that it could be inferred that the City of Houston through its high ranking officials implicitly authorized or approved such conduct. 735 F.2d at 853. Thus, the *Webster* majority would require evidence of unconstitutional action occurring "for so long or so frequently . . . that the objectionable conduct is the expected, accepted practice of city employees." The *Webster* minority would require evidence of "a regular pattern of such conduct." Either test is acceptable to the City of Oklahoma City. At a minimum, a plaintiff should be required to submit probative evidence of a regular pattern of unconstitutional deprivation of citizen's rights before municipal liability can attach under §1983.

On the same day that the Fifth Circuit issued its opinion on rehearing in *Webster*, the Eleventh Circuit issued

its opinion in *Gilmere v. City of Atlanta, Ga.*, 737 F.2d 894 (11 Cir. 1984). Gilmere's decedent, one Thomas Patillo, spent the afternoon of New Year's Day, 1980, drinking heavily. In an ensuing fracas with police officers, Patillo was shot twice in the abdomen and died shortly thereafter. The Eleventh Circuit stated plaintiff's theory under §1983 as follows:

> "The City allegedly deprived Patillo of these [constitutional] rights by promulgating a policy that permitted the deployment of untrained police officers and the use of excessive force in police-citizen encounters." 737 F.2d at 899.

The trial court entered judgment against the City of Atlanta on the ground that it had trained the policeman in a grossly negligent manner. Reversing the trial court, the Eleventh Circuit held that "gross negligence" was an inadequate basis for municipal liability under *Monell*.

> "Thus, *Monell* imposes liability on municipalities for deprivations of constitutional rights visited pursuant to municipal policy, whether that policy is officially promulgated or authorized by custom. The official policy or custom 'must be the moving force of the constitutional violation in order to establish liability of a government body under §1983.'" [citing cases] 737 F.2d at 901.

The trial court in *Gilmere* had found that the police department's training of the offending officer had been so lacking as to constitute "gross negligence" or "deliberate indifference." 737 F.2d at 903. The Eleventh Circuit held that the question of whether the Atlanta Police Department had been negligent in training the police officer is "irrelevant under the *Monell* standard." Id. at 902. In holding the gross negligence-indifference standard insufficient under *Monell* to place liability on the City of Atlanta, the Eleventh Circuit stated:

> "'Gross negligence' or 'deliberate indifference' is simply not the proper test for adjudging a due process section 1983 claim against a municipality.
>
> "In summary, the plaintiff in this case presented, at best, an isolated incident in which the police officers used excessive force to restrain an arrestee. The plaintiff did not present an incident that was the product of a City or police department custom to use excessive force. • • • Patillo's injury at the hands of Officers Craig and Sampson was not caused by their execution of official municipal policy or of custom. Accordingly, the judgment against the City of Atlanta must be reversed." 737 F.2d at 904, 905.

D. The Decision of the United States Court of Appeals for the Tenth Circuit.

In the instant case, the trial court instructed the jury that Officer Rotramel had the defense of "good faith" immunity to protect him against the claims of the plaintiff. The jurors were told that if they found Officer Rotramel acted with a good faith belief that his actions were lawful and reasonable under the existing circumstances, they should return a verdict for Rotramel. The jury did so. The Tenth Circuit affirmed. It is difficult to harmonize the portion of the Tenth Circuit's opinion which affirmed the judgment in favor of Rotramel, with that portion of the opinion that affirmed the judgment against Oklahoma City. For example, the Tenth Circuit stated:

> "Defendant Rotramel admitted at trial *that he violated Police Department policy* in shooting Mr. Tuttle." 728 F.2d at 458-459. (Emphasis supplied.)

As noted, the "policy" of Oklahoma City was (and is) that police officers are not justified in using firearms ex-

cept in defense of life or where the suspect is armed and/or attempting to kill or do great bodily harm. The act of Rotramel in discharging his service revolver and thereby causing the death of William Tuttle, was at odds with the "official policy" of Oklahoma City. Thus, the first fork of the *Monell* test was not met under the circumstances surrounding this incident. But, regardless of the absence of such an official policy on the part of Oklahoma City, what about "custom"? As the Eleventh Circuit stated in *Gilmere v. City of Atlanta, Ga., supra:*

> "*Monell* limits what may constitute 'custom.' Custom consists of those practices of city officials that are 'so permanent and well settled' as to have 'the force of law.' Id. 436 U.S. at 691, 98 S.Ct. at 2036. In defining custom in this fashion the *Monell* Court borrowed language from *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970), which defines the term 'custom' as 'persistent and widespread . . . practices' or practices that are 'permanent and well settled' or 'deeply embedded traditional ways of carrying out . . . policy.' Id. Accord, *Bennett v. City of Slidell*, 728 F.2d 762 (5 Cir. 1984) (en banc). *Monell* additionally teaches that the city custom which may serve as the basis for liability may only be created by city 'lawmakers or those whose edicts or acts may fairly be said to represent official policy.' 436 U.S. at 694, 98 S.Ct. at 2037-38." 737 F.2d at 901, 902.

One does not have to define "custom" in the restrictive terms of *Monell* to see the flaw in plaintiff's proof in this case Here, there was a complete absence of *any* proof that Oklahoma City had a "custom" of blinking at the improper use of firearms by its police officers, much less a practice so "persistent and widespread" or "permanent and well settled" or "deeply embedded in traditional ways of carrying out policy" as to come within the *Monell* rule.

The facts are simply these: Officer Rotramel was trained for 18 weeks at taxpayer expense. Oklahoma City gave him the same training it gave all the other cadets in his class at the police academy. There was no showing that any other member of that class ever acted in a manner that betokened inadequate training, much less grossly inadequate training. There was no showing that any other Oklahoma City policeman used his weapon improperly.

How can it seriously be contended that Oklahoma City had "an official policy or custom" of giving its police officers grossly inadequate training? Where is the proof that would support such a bazaar contention? Such proof does not exist.

Even assuming more than *Monell* requires; that is, even *assuming* that "gross negligence" or "deliberate indifference" supply the standards by which municipal liability is to be tested under § 1983—and *Monell* does not say that by a long shot—such proof in the instant case is utterly wanting. Tested by the strict language of *Monell*—that is, *official policy or custom* of giving its police officers inadequate training, the proof in this case is directly contrary to the plaintiff's theory. Oklahoma City requires all of its police officers to undergo lengthy and rigorous training. And, Oklahoma City's official policy or custom is to sanction the use of firearms only under the most extreme circumstances of threatened mortal harm to the police officer or other innocent persons.

Thus, we come full circle: may a single incident of excessive force, coupled with the testimony of an expert witness that the officer was not properly trained to deal with the situation he confronted, provide the basis for

holding that the municipality had an "official policy or custom" of depriving its citizens of their constitutional and statutory rights?

It is respectfully submitted that more should be required. It is difficult to see what Oklahoma City could have done differently to anticipate and prevent the Rotramel/Tuttle incident. The City of Oklahoma City covers many square miles. It doesn't have the money to afford the luxury of putting two policemen in each cruiser. Oklahoma City's police force is spread thin. (Tr. 206.) Surely it is not too much to require that a plaintiff submit proof of some pattern of misbehavior that is sanctioned, or at least tolerated, by high ranking city officials, before the municipality itself may be held liable in damages under § 1983. Such a standard comports more readily with the notion that the citizens of the municipality, who bear the financial burden of the judgment through taxation, share in the responsibility for the event. In a democracy, such a standard at least harmonizes with the theory that the people are the ultimate sovereign.

SUMMARY

It is respectfully submitted that the decision of the United States Court of Appeals for the Tenth Circuit should be reversed.

BURCK BAILEY
MARGARET MCMORROW-LOVE
FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS
24th Floor, First National Center
Oklahoma City, Oklahoma 73102
(405) 232-0621

Attorneys for Petitioner,
The City of Oklahoma City

(5)

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1919

In The

Supreme Court of the United States

October Term, 1984

THE CITY OF OKLAHOMA CITY,

Petitioner,

vs.

ROSE MARIE TUTTLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

BURCK BAILEY
Counsel of Record

MARGARET MCMORROW-LOVE
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
2400 First National Center
Oklahoma City, OK 73102
(405) 232-0621

Counsel for Petitioner

CARL HUGHES
MICHAEL GASSAWAY
1501 Classen Blvd.
Suite 200
Oklahoma City, OK 73106
(405) 528-2300

Counsel for Respondent

PETITION FOR CERTIORARI FILED MAY 24, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

No. 83-1919

In The

Supreme Court of the United States

October Term, 1983

THE CITY OF OKLAHOMA CITY,

Petitioner,

v.

ROSE MARIE TUTTLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

TABLE OF CONTENTS

	Page
RELEVANT DOCKET ENTRIES	1
COMPLAINT	12
ANSWER	21
REQUESTED INSTRUCTION NO. 3 OF THE CITY OF OKLAHOMA CITY	24
REQUESTED INSTRUCTION NO. 4 OF THE CITY OF OKLAHOMA CITY	25

TABLE OF CONTENTS—Continued

	Page
INSTRUCTIONS TO THE JURY BY THE COURT (FROM TRANSCRIPT OF PROCEEDINGS OF JUNE 3, 1982)	25
JUDGMENT DATED JUNE 7, 1982	54
ORDER DATED AUGUST 11, 1982	56
NOTICE OF APPEAL DATED SEPTEMBER 10, 1982	60
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED FEBRUARY 28, 1984	61
TESTIMONY OF VONNIE HINDS	74
TESTIMONY OF BEVERLY JEAN HAYES	103
TESTIMONY OF JULIAN ROTRAMEL	143
TESTIMONY OF RILEY LENNOX	250
TESTIMONY OF DR. GEORGE KIRKHAM	271

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
5-22-81		COMPLAINT
6-17-81		ENTER Order plf is direct to resp w/supp brief & such docs as desired w/in 15 days to dft Julian Rotramel's mtn to dism (West) rw cc: attys
7-6-81		ANSWER of dfts The City of Okla. City & Julian Rotramel to plf's compl -ws
7-6-81		MOTION by dfts The City of Oklahoma City & Julian Rotramel to strike -ws
7-6-81		BRIEF of dfts in supp of mtn to strike -ws
7-8-81		ENTER Order plf is hereby direct to resp w/ supp brief & such docs as desired w/in 15 days fm the date hereof to dfts' mtn to strike; plf is also advised that if his resp to dft's mtn to dism is not rec'd w/in the next 5 days that said mtn will be grtd (West) rw cc: attys
7-10-81		BRIEF of plf in resp to dft's mtn to dism -ws
7-13-81		ENTER Order the Ct has considered the dft Julian Rotramel's mtn to dism & accompanying brief filed 6-16-81 & plf's brief in resp thereto; the pleadings in the case would reflect that the dft Julian Rotramel was served by alias summons on 6-26-81; therefore, the mtn to dism is denied (West) cc: attys
7-23-81		REPLY brief of plf to dfts' mtn to strike -ws
7-30-81		FIRST set of interrogs by dfts to plf -ws
8-12-81		ORDER plf's prayer for punitive damages is strkn agnst the dfts municipality & to that

DATE	NR	PROCEEDINGS
		extent the dfts' mtn to strike is grtd; the plf's prayer for punitive damages agnst the dft Rotermel individually is not strkn & therefore the dft's mtn to strike as it pertains to dft Rotermel individually is denied (West) cc: attys
8-28-81		SECOND set of interrogs by dfts to plf -ws
9-2-81		INTERROGATORIES by plf to dft Officer Julian Rotermel -ws
9-2-81		INTERROGATORIES by plf to dft City of Oklahoma City -ws
9-24-81		ANSWERS by plf to dfts' first set of interroga -ws
9-24-81		ANSWERS by plf to dfts' second set of interrogs -ws
9-30-81		MOTION by plf to strike & brief in supp -ws
10-2-81		ANSWERS by dfts to plf's interrogs -ws
10-2-81		ANSWERS by dfts to plf's interrogs -ws
10-5-81		ENTER Order dft is hereby direct to resp w/ supp brief & such docs as desired w/in 10 days fm the date hereof to plf's mtn to strike (West) rw cc: attys
10-6-81		THIRD set of interrogs of dfts to plf -ws
10-6-81		REPLY brief of dfts in resp to plf's mtn to strike -ws
10-20-81		MOTION by plf to compel proper verification of answers to interrogs w/BRIEF in supp -ws
10-20-81		MOTION by plf for production of docs by dft City of Okla. City -ws
10-20-81		INTERROGATORIES propounded by plf to dft Rotramel -ws
10-20-81		SECOND set of interrogs propounded by plf to dft City of Okla. City -ws

DATE	NR	PROCEEDINGS
10-27-81		AMENDMENT by plf to mtn for production of docs & mtn to compel proper verification of answers to interrogs -ws
10-29-81		ORDER the Ct finds that plf's mtn to strike the second affirmative defense asserted in the dfts' answer is denied (West) cc: attys
11-6-81		MOTION by plf for production of docs by dft City of Okla. City -ws JURY TRIAL DEMANDED
11-6-81		REQUEST by plf for admissions by dft City of Okla. City -ws
11-6-81		MOTION by plf for production of docs by dft City of Okla. City -ws
11-6-81		INTERROGATORIES by plf to dft Rotramel -ws
11-6-81		INTERROGATORIES by plf to dfts City of Okla. City & Officer Rotramel -ws
11-6-81		MOTION by plf for production of docs by dft City of Okla. City -ws
11-10-81		ANSWERS by dft Officer Julian Rotramel to interrogs of plf -ws
11-10-81		ANSWERS by dft City of Oklahoma City to interrogs of plf -ws
11-16-81		ENTER Order dft is direct to resp w/supp brief & such docs as desired w/in 10 days fm the date hereof to plf's mtns for production of docs (West) rw cc: attys
11-25-81		ORDER dfts are grtd 20 addl days fm 11-26-81 w/in which to resp to plf's mtns for production of docs (West) cc: attys
12-2-81		MOTION by plf for production of docs -ws
12-2-81		INTERROGATORIES propounded by plf to dft Rotramel -ws

DATE	NR	PROCEEDINGS
12-7-81		ANSWERS by plf to third set of interrogs propounded by dfts -ws
12-16-81		RESPONSE by dfts to mtn for production of docs -ws
12-16-81		RESPONSE by dfts to requests for admissions -ws
12-16-81		ENTRY of appearance of Richard E. Mahoney as atty of record for dfts
12-28-81		INTERROGATORIES to Deft Rotramel by Pltf -ws
1-4-82		ENTRY of appearance of Carl Hughes as addl cnsl of record for plf -ws
1-4-82		AMENDMENT to compl by plf w/LV GRTD TO FILE (West) -ws
1-4-82		STATUS/disc rpt of plf -ws
1-4-82		MOTION by plf for production of docs -ws
1-4-82		DISCOVERY/STATUS rpt of dfts -ws
1-7-82		ENTER Status Conf. Parties state contentions; suppl pretrial to be set Feb., 1982 parties to confer w/regard to production of docs; any further disputes to be brought to Ct's attention by way of renewed mtn to produce (West) rw
2-5-82		ENTER Pretrial. Parties state contentions; disc completion date 4-1-82; suppl pretrial to be set April, 1982; case to be on May jury dkt (West) rw
2-26-82		ANSWER by dft Julian Rotramel to interrogs of plf filed 11-6-81 w/LV TO FILE OUT OF TIME (West) cc: attys
2-26-82		ANSWER by dft Julian Rotramel to interrogs of plf filed 12-2-81 w/LV TO FILE OUT OF TIME (West) cc: attys

DATE	NR	PROCEEDINGS
2-26-82		ANSWER by dft Julian Rotramel to interrogs of plf filed 12-28-81 w/LV TO FILE OUT OF TIME (West) cc: attys
3-1-82		ANSWER of dft Okla. City to interrogs of plf filed 11-25-81 w/LV TO FILE OUT OF TIME (West) -ws
3-4-82		APPLICATION by plf for order compelling answer to interrog -ws
4-2-82		ENTER Pretrial. Parties state contentions; disc completion date ext to 5-1-82; case to be on May, 1982, jury dkt (West) rw
4-6-82		TRIAL Order (West) cc: attys
4-8-82		INTERROGATORIES by plf to dft City of Okla. City -ws
4-21-82		PRELIMINARY stmt by plf identifying the case -ws
4-26-82		STATEMENT by dfts identifying the case -ws
4-27-82		AMENDMENT to compl by plf w/LV GRTD TO FILE (West) -ws
4-27-82		MOTION by plf to compel disc & production of docs & to tax costs, or in the alternative, applica for sanctions & BRIEF in supp -ws
4-27-82		MOTION by plf to strike good faith defense -ws
4-27-82		BRIEF by plf in supp of mtn to strike good faith defense -ws
4-29-82		REQUEST by dfts for protective order -ws
4-29-82		BRIEF of dfts in supp of protective order -ws
4-28-82		ENTER Order dft is direct to resp w/supp brief & such docs as desired w/in 7 days fm this date to plf's mtn to strike good faith defense & mtn to compel disc & production of docs (West) rw cc: attys

DATE	NR	PROCEEDINGS
4-30-82		TRIAL brief of plf -ws
4-30-82		REQUESTED instructions by plf -ws
4-30-82		WITNESS list of plf -ws
4-30-82		EXHIBIT list of plf -ws
5-3-82		ENTER Order plf is direct to resp w/supp brief & such docs as desired w/in 5 days fm this date to dfts' mtn for protective order (West) rw cc: attys
5-5-82		OFFERED stipulations by plf & dfts
5-5-82		MOTION in limine by plf & BRIEF in supp -ws
5-5-82		MOTION in limine by plf & BRIEF in supp -ws
5-5-82		RESPONSE by plf to dft's mtn for protective order -ws
5-5-82		REQUESTED voir dire (to panel as a whole) by plf -ws
5-5-82		RESPONSE by dfts to plf's mtn to compel & production of docs -ws
5-5-82		RESPONSE by dfts to mtn to strike good faith defense -ws
5-6-82		SUPPLEMENTAL witness list of plf -ws
5-6-82		OBJECTION by dfts to witnesses of plf -ws
5-6-82		BRIEF of dft in supp of objection to plf's witnesses -ws
5-6-82		TRIAL brief of dft -ws
5-7-82		LIST of exhbs of dft -ws
5-7-82		REQUESTED jury instructions by dft -ws
5-7-82		OBJECTIONS of dfts to plf's list of exhbs -ws
5-13-82		ENTER Order plf Rose Marie Tuttle has moved the Ct to compel dft City of Okla. City to produce various docs & items & has further moved

DATE	NR	PROCEEDINGS
		the Ct to impose a variety of sanctions on the dft; the Ct finds plf's mtn to produce docs is moot except for the matter re the imposition, if any, of sanctions, upon which the Ct defers its ruling (West) cc: attys
5-13-82		ENTER Order the Ct finds that dft City of Okla. City's mtn for protective order requesting that disc not be had is denied (West) cc: attys
5-13-82		ENTER Order the Ct finds that plf's mtn to strike good faith defense is denied at this time (West) cc: attys
5-18-82		INTERROGATORIES by plf propounded to Fred B. Jordan, Medical Examiner -ws
5-18-82		SUPPLEMENTAL requested instructions by plf -ws
5-20-82		RESPONSE by dfts to plf's mtns in limine -ws
5-21-82		APPLICATION by plf for sanctions & BRIEF in supp -ws
5-21-82		MOTION by dft City of Okla. City to reconsider request for protective order & request for oral argument -ws
5-21-82		BRIEF of dft City of Okla. City in supp of mtn to reconsider request for a protective order -ws
5-24-82		RESPONSE by plf to dfts' mtn to reconsider request for protective order -ws
5-24-82		ENTER Order plf has moved the Ct to prohibit the introduction of any evid that the victim William Adam Tuttle had attempted suicide 7 mos. prior to being shot outside the We'll Do Club, etc.; the Ct finds plf's mtn in limine is denied w/o prej to plf renewing her objections to said evid at the time of trial (West) cc: attys

DATE	NR	PROCEEDINGS
5-24-82		ENTER Order plf has moved the Ct to prohibit the introduction of any evid that the victim William Adam Tuttle telephoned the police dept & reported an armed robbery was in progress at the We'll Do Club, etc.; the Ct finds that plf's mtn in limine is denied w/out prej to plf renewing her objections at time of trial (West) cc: attys
5-24-82		ENTER Order the Ct finds that dft's mtn to reconsider request for protective order is denied & that the records in the possession of the dft are to be made available for inspection by plf; the Ct finds that imposition of sanctions is not warranted & that plf's applica for sanctions is denied (West) cc: attys
5-26-82		ANSWER by Fred B. Jordan, Medical Examiner, to interrogs -n/s
5-12-82		ENTER Jury Trial. Jury duly empaneled & admonished; Ct adjourns to 9:00 a.m., 5-28-82 (West) rw
5-28-82		ENTER Further Jury Trial. Rule invoked on mtn of plf; plf & dft make opening stmts; plf presents case in chief w/test of witnesses; plf's exhbs 4A, 4B thru 4G, 6A thru 6C, 5A thru 5D, 35, 22, 6, 36, 3A, 3B admitted; Flarva Baer dism as juror & is replaced by Cecelia Frank, 1st alt.; Ct adjourns to 9:00 a.m., 6-1-82 (West) rw
6-1-82		ENTER Further Jury Trial. Plf continues case in chief w/test of witnesses; plf's exhbs 29, 13A, 13B, 4-H, 4-I, 17A, 17B, 19, 38, 8 admitted; dft's exhb 2 admitted; plf rests; dft's mtn for DV denied; dft presents case in chief w/test of witnesses; Ct adjourns to 9:00 a.m., 6-2-82 (West) rw
6-2-82		ENTER Further Jury Trial. Plf's exhbs 39, 1 admitted; dft's exhbs 3, 4 admitted; dft continues case in chief w/test of witnesses & rests; parties rest; plf & dft's mtn for DV denied; Ct adjourns to 10:00 a.m., 6-3-82 (West) rw

DATE	NR	PROCEEDINGS
6-3-82		ENTER Further Jury Trial. Closing arguments; Ct instructs jury; alternate discharged; jury retired to deliberate, returns w/verdict; Ct & cnsl feel verdict forms are inconsistent; Ct excuses jury until 9:00 a.m., 6-4-82 (West) rw
6-4-82		DEPOSITION test of Julian Rotramel -ws
6-4-82		DEPOSITION test of Officer Riley Lenex -ws
6-4-82		DEPOSITION test of Charles Edward Hill -ws
6-4-82		DEPOSITION test of Officer James Stanley Moss -ws
6-4-82		INSTRUCTIONS to the jury (West)
6-4-82		ENTER Further Jury Trial. Jury returns w/verdict for plf, is polled, is discharged; dft moves for judgm NOV—denied (West) rw
6-4-82		VERDICT Form No. 2 "We, the jury, find in favor of the dft Julian Rotramel & agns the plf, so that plf takes nothing by way of her claims agnst this dft" (Walter O. Kibbe, Foreman)
6-4-82		VERDICT Form No. 3 "We, the jury, find in favor of plf & agnst the dft City of Okla. City on the claim of violation of Civil Rights, 42 U.S.C. §1983 & find that actual or nominal damages proximately resulted fm the acts of said dft in the amt of $1,500,000.00" (Walter O. Kibbe, Foreman)
6-4-82		TWO BLANK verdict forms, Nos. 1 & 4
6-4-82		DEPOSITION of Charles Edward Hill, taken on behalf of plf, before Gail M. Taylor, CSR (Fees: $95.05 pd by plf)

DATE	NR	PROCEEDINGS
6-7-82		JUDGMENT that plf Rose Marie Tuttle take nothing by way of her claims agnst the dft Julian Rotramel & that said dft recover of plf his costs of this action; further that plf recover of the dft the City of Okla. City the sum of $1,500,000.00, w/int thereon at the rate provided by law, & her costs of the action (West) (COB #150) (Clerk) AND ENTERED -rw cc: attys
6-9-82		TRANSCRIPT of excerpt of proceedings of jury trial had 5-28-82, before Mary Garv Ct Rptr (Fees: $17.50 pd by plf)
6-14-82		MOTION by dft City of Okla. City fcr judgm NOV -ws
6-14-82		BRIEF OF dft City of Okla. City in supp of mtn for judgm NOV -ws
6-16-82		ENTER Order plf is direct to resp w/in 15 days to dft City of Okla. City's mtn for judgm NOV (West) cc: attys
6-17-82		DEPOSITION of Bertha Kay Conners, taken on behalf of dfts, before Ken Courtemanche CSR (Fees: $36.00 pd by dfts)
6-24-82		DEPOSITION of Beverly Jean Hayes, taken on behalf of dfts, before Ken Courtemanche CSR (Fees: $78.00 pd by dfts)
6-29-82		BRIEF OF plf in resp to dft's mtn for judgm NOV -ws
8-11-82		ORDER dft's mtn for judgm NOV is denied (West) cc: attys
8-18-82		APPLICATION by dft City of Okla. City for extens of time to comply w/the Ct's order of 8-2-82 -ws
8-20-82		MOTION by dft City of Okla. City to w/draw certain exhbs -ws

DATE	NR	PROCEEDINGS
8-24-82		RECEIPT by Richard F. Mahoney, cnsl for dft City of Okla. City, of said dft's exhbs 3a, 3b & 6, said exhbs have been w/drawn in compliance w/order of the Ct filed 8-23-82
9-10-82		NOTICE of appeal by dft City of Okla. City fm the judgm entered 6-7-82 & the order denying dft's mtn for judg NOV entered 8-11-82
9-10-82		RECEIVED $5.00 filing fee & $65.00 docketing fee. Receipt #19624
9-16-82		CLERK'S ltr re service of notice of appeal, w/copy ltr, notice of appeal & dkt sheet to cnsl & CCofA -mlc CCA #————
9-22-82		NOTICE of appeal by plf fm the judgm entered 6-7-82 -ws
9-22-82		CLERK's ltr re service of notice of appeal, w/copy ltr, notice of appeal & dkt sheet to cnsl & CCofA -mlc CCA #————
9-21-82		NOTICE of transcript order (ECD 1-30-83) cc: cnsl & CCofA -mlc

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTERMEL, Individually and as an Employee of the City of Oklahoma City, Through the Oklahoma City Police Department,

Defendants.

COMPLAINT

(Filed May 22, 1981)

The Plaintiff, Rose Marie Tuttle, acting Administratrix of the Estate of William Adam Tuttle, deceased, complaining of the Defendants and each of them, alleges and states:

I

This action filed for damages proximately caused by the deprivation by Defendants of rights protected by the Constitutions of the United States and the State of Oklahoma, Federal and State statutes, and the common law of the State of Oklahoma.

This is an action at law brought for the benefit of Plaintiff and next of kin of the deceased, William Adam Tuttle, to redress the deprivation under color of statute, ordinance, regulation, custom or usage, of rights, privileges or immunities secured to the Plaintiff by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and also arising out of the law, statutes and Constitution of the State of Oklahoma, and more particularly set out hereinafter.

Jurisdiction

II

This action is brought pursuant to Title 42 of the United States Code, Sections 1983, 1985, 1986 and 1988; directly under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is founded upon Title 28 of the United States Code, Sections 1331, 1343, and 1391(b) and the Constitution of the United States, Fourteenth Amendment thereto, to redress the deprivation under color of statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured in the Constitution and the laws of the United States.

Plaintiff further invokes pendent jurisdiction of this Court to consider the claims arising under State law, this being an action wherein the State and Federal claims derive from a common nucleus of operational facts, and are such that the Plaintiff would normally be expected to try them all in a single judicial proceeding.

This action for damages is also authorized by laws of the State of Oklahoma, in particular 12 O.S. §1052 and 76 O.S. §6.

On the 24th day of November, 1980 the Plaintiff presented a timely claimed to the City of Oklahoma as provided in 51 O.S. §156, but said claim was neither paid nor was payment thereon refused, and has therefore been de-

nied by operation of law, and by operation of the Oklahoma Statutes 51 O.S. §157. Further, all conditions precedent have been fulfilled to the bringing of this action.

The amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000.00.

Parties

III

Plaintiff Rose Marie Tuttle, individually and as acting Administratrix of the Estate of William Adam Tuttle, is a citizen of the United States and the State of Oklahoma.

During all times mentioned herein, the Defendant Officer Julian Rotermel was a resident of Oklahoma County, State of Oklahoma, and was duly employed by the City of Oklahoma City through the Oklahoma City Police Department, as a police officer of the City of Oklahoma City within Oklahoma County, State of Oklahoma.

Plaintiff alleges that at all times hereinafter mentioned, the Defendant Julian Rotermel was acting for and on behalf of the City of Oklahoma City, in his official capacity as a policeman.

That at all times hereinafter mentioned the Defendant City of Oklahoma City was and still is a municipal corporation, organized and existing under the by virtue of the laws of the State of Oklahoma, and may be served with summons by serving the Mayor Patience Latting.

That at all times hereinafter mentioned the Defendant City of Oklahoma City, by and through the Oklahoma City Police Department, hired and employed the Defendant Julian Rotermel to act as a police officer in the City of Oklahoma, and at all times condoned the acts and actions of the individual Defendant.

That at all times hereinafter mentioned the acts of the Defendant Julian Rotermel and the City of Oklahoma City were done under the color and pretense of the statutes, ordinances, regulations, customs and usages of the State of Oklahoma, and that the acts of the Defendant Rotermel were done as an agent, servant, and employee of the City of Oklahoma City, and the acts herein alleged were imputed to the Defendant City of Oklahoma City, who was acting pursuant to the orders and directives from the Defendant through the Oklahoma City Police Department.

Factual Allegations

IV

On or about the 4th day of October, 1980 at approximately 8:00 o'clock p.m. the Defendant Officer Julian Rotermel arrived to investigate a reported robbery at the We'll Do Club in Oklahoma City, Oklahoma County, State of Oklahoma.

There was no armed robbery at the We'll Do Club and although Defendant Rotermel found no evidence of an armed robbery, said Defendant wrongfully detained and seized William Adam Tuttle who was lawfully on the premises and at the time was committing no unlawful act.

Although the Defendants knew or should have known, based upon interrogation and investigation having previously taken place, that the decedent was not involved

in any armed robbery, that he was not committing any crime at the time, the Defendants without provocation or cause improperly detained the decedent by asking him to remain in the premises. When the decedent attempted to leave the club, Defendant Rotermel without warning and without further attempt to detain decedent, and without any provocation whatsoever, or without just or probable cause, fired a shot at the decedent, which struck him and ultimately caused his death.

Defendant never at any time advised decedent of any constitutional rights, but when decedent tried to exercise his rights, he was shot to death.

The City of Oklahoma City inadequately trained its police officer and hired inadequately trained personnel as Defendant police officer did not even know the constitutional rights of the decedent, or if he knew said constitutional rights of the decedent, intentionally deprived said decedent of such rights.

The City of Oklahoma City had actual knowledge or should have known of the propensity of said Defendant for violence and of his propensity of depriving citizens of the rights guaranteed by the Constitution of the United States based upon the systematic violations that have occurred through the Police Department of Oklahoma City in recent months past, and knew or by the exercise of reasonable care should have known that said Defendant was careless, unqualified and had a propensity for intentional deprivation of constitutional and civil rights of citizens. The City of Oklahoma City further failed to ascertain qualifications for their employees to enforce the laws in the City of Oklahoma City, State of Oklahoma, and in truth and fact chose to ignore any information of said

propensities, abuse and oppression chose to allow current policies to remain in full force and effect in violation of decedent's constitutional rights.

By reason of the unlawful and illegal shooting of the decedent by the Defendant, said decedent suffered severe pain and agony, mental and physical, and ultimately met his death.

The Defendants and each of them by their reckless, violent and malicious unlawful shooting of the decedent, under the color of state and local law, regulations, customs and usages, and under the authority of their respective official capacities, deprived said William Adam Tuttle of life, liberty, and property without due process of law in contravention of the rights secured to him under the Fourteenth Amendment of the United States Constitution, and has deprived said William Adam Tuttle, deceased, of his right to be free from cruel and unusual treatment guaranteed by the Constitution of the United States; and has deprived said William Adam Tuttle, deceased, of his rights, privileges and immunities secured to him by the First and Fourteenth Amendments to the United States Constitution; and has deprived said William Adam Tuttle, deceased, of equal protection of the law and the privileges and immunities granted him under the law in contravention of the Fourteenth Amendment of the United States Constitution; with reckless, wanton, negligent disregard of his rights, harmed, and ultimately killed said William Adam Tuttle in violation of the heretofore set forth laws; further, deprived said decedent of rights secured to him by the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States in that decedent was subjected to an unlawful shooting and killing; and

deprived William Adam Tuttle, deceased, of rights secured to him by the Eighth and Fourteenth Amendments to the Constitution of the United States in that the use of excessive and unnecessary force resulting in the assault and battery, bodily injury and death, and mental, physical and emotional distress of the decedent, constituted the infliction of the cruel and unusual punishment upon him; and further, deprived the decedent of rights secured to him by the Sixth and Fourteenth Amendments to the Constitution of the United States in that excess force exercised at the hands of the Defendants, constituted an infliction of summary punishment which denied decedent of his rights to a fair and impartial trial prior to infliction of such punishment.

The assault and shooting of the decedent was a wilfull and malicious act upon the decedent and constituted an assault and battery and ultimately homicide upon his person.

The injuries to decedent resulted from the above-described wrongful acts of each of the Defendants. Such wrongful acts were of such a character that Plaintiff is entitled to maintain an action for such injuries. The wrongful acts and wilfull, malicious and wanton, constitute gross negligence, and evidence the conscious indifference to the clear risk involved of the rights of the decedent, and the citizens of the State of Oklahoma. Accordingly, the Plaintiff is entitled to recover exemplary and punitive damages, in additional to compensory damages. The injuries to the decedent were the direct and proximate result of the above-described wilfull, malicious and wrongful acts of the Defendants.

In the alternative the injuries to the Plaintiff were the direct and proximate result of the negligence, gross and wanton and wilfull negligence acts of the Defendants.

Plaintiff alleges that as a direct and proximate result of the negligence of the Defendants as aforesaid, and the death of William Adam Tuttle, and as a direct and proximate result thereof in the violation of his civil rights, Plaintiff became obligated to pay burial and funeral expenses in the amount of $2,134.65, and has further incurred hospital expenses in the amount of $500.00, and has incurred ambulance expenses in the amount of $200.00, for which Plaintiff claims damages against these Defendants.

Plaintiff alleges that at the time of the death of her husband, he was a normal healthy, able-bodied man of 35 years of age, of ordinary capacity and understanding of a man of that age and had a life expectancy of 37 years.

Plaintiff alleges that as a direct and proximate result of the acts aforesaid and the resulting death of her husband, as a surviving spouse and next of kin and heir at law, she has suffered pecuniary loss in the amount of $455,000.00, which Plaintiff claims damages against the Defendants.

Plaintiff alleges that following the passing of the bullet into the body of the decedent which ultimately caused his death, said decedent prior to this death, suffered severe, agonizing and excrutiating pain, both physical and mental, for which Plaintiff is entitled to recover damages on behalf of his estate in the amount of $2,000,000.00.

Plaintiff further alleges that as a result of harrassment, humiliation and embarrassment suffered by William

Adam Tuttle, prior to his death, he is entitled to monetary damages in the amount of $55,000.00.

Plaintiff further alleges that the acts of the Defendants were unwilfull, malicious and with callous and reckless indifference to and in disregard of the decedent's safety and continued life, and by reason of which Plaintiff's decedent is entitled to punitive damages in the amount of $1,500,000.00.

Prayer for Relief

IV

WHEREFORE, Plaintiff respectfully prays that this Honorable Court:

1. Assume jurisdiction over Plaintiff's causes of action.

2. Grant your Plaintiff the sum of $2,834.65 for actual expenses.

3. Grant your Plaintiff the sum of $455,000.00 for pecuniary losses.

4. Grant your Plaintiff the sum of $2,000,000.00 for pain and suffering of the decedent prior to his death.

5. Grant your Plaintiff the sum of $55,000.00 for harrassment, humiliation and embarrassment suffered prior to his death.

6. Grant your Plaintiff the sum of $1,500,000.00 for punitive damages.

7. And that this Honorable Court enter its order granting your Plaintiff monetary damages for the violation of the rights, privileges and immunities secured to

the Plaintiff under the laws of the Constitution of the United States in the amount of $2,512,834.65 and $1,500,000.00 punitive damages.

8. Grant such other and further relief which the Court may deem just and appropriate; and

9. Award your Plaintiff costs, expenses and attorney's fees where appropriate.

Respectfully submitted,

MISKOVSKY & GASSAWAY
Attorneys for Plaintiff

By /s/ MICHAEL GASSAWAY

JURY TRIAL DEMANDED

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

NO. CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTERMEL, Individually and as an Employee of the City of Oklahoma City Police Department,

Defendants.

ANSWER

(Filed July 6, 1981)

COME NOW the Defendants, The City of Oklahoma City and Julian Rotramel, by and through their attorney of record, Grant E. Price, Assistant Municipal Counselor and for their answer to Plaintiff's Complaint do generally and specifically deny each and every material allegation and claim contained therein except what is specifically admitted, to-wit:

1. The jurisdiction of this Court and the basis thereof.

These Defendants would further assert, in the form of Affirmative Defenses, the following, to-wit:

1. That the Defendant Julian Rotramel, was at all times mentioned in Plaintiff's Complaint, duly qualified, appointed and an acting police officer of the City of Oklahoma City and a peace officer of the State of Oklahoma and that at all times herein mentioned said employee was engaged in the performance of his regularly assigned duties as a police officer.

2. That the Defendant employee at all times herein mentioned acted in good faith without malice and within the scope of his duties as a police officer of the City of Oklahoma City and peace officer of the State of Oklahoma.

3. That any injury to Plaintiff or William Adam Tuttle, Deceased, was due to and caused by the negligence and omissions of said Tuttle to care for himself, which carelessness and negligence and omissions were the proximate cause of the damage, if any to the Plaintiff and William Adam Tuttle.

4. That any injury or damage suffered by Plaintiff or Tuttle, was caused solely by reason of Tuttle's wrongful acts and conduct and the willfull resistance to a peace officer in the discharge, and attempt to discharge the duty of his office, and not by reason of any unlawful acts or omissions of the Defendant.

5. That the actions of the Defendant and its employee were lawful and proper and probable cause existed for the arrest of Tuttle.

6. That the action of the Defendant and its employee in all respect was reasonable, proper and legal.

7. A public employee is not liable for any injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law.

8. Tuttle knew or should have known that he was being arrested by a peace officer and had the duty of refrain from using force, threats of force, or any weapon to resist such arrest.

9. To the extent that Plaintiff and Tuttle suffered any detriment, such detriment was caused or contributed to by Tuttle's negligence.

10. Plaintiff and Tuttle did not suffer any detriment or damages in any amount whatsoever.

11. Tuttle failed to take reasonable action to avoid or to mitigate the alleged detriment or damages.

12. If Plaintiff or said Tuttie suffered any detriment, such was not proximately caused by Defendant.

13. To the extent that the Defendant used any force during the incident complained of, he did so to resist the commission of a public offense.

WHEREFORE, having fully and completely answered the Plaintiff's Complaint, the Defendants demand strict proof of all allegations and claims contained in said Complaint and for a trial by jury of same, and further pray that Plaintiff take nothing and that the defendants go free of all costs herein.

WALTER M. POWELL
MUNICIPAL COUNSELOR

By: /s/ GRANT E. PRICE
Assistant Municipal Counselor
309 Municipal Building
200 North Walker
Oklahoma City, Oklahoma 73102
(405) 231-3819

Attorneys for Defendants

CERTIFICATE OF MAILING

This is to certify that on this 6 day of July, 1981, a true and correct copy of the above and foregoing Answer was mailed to Michael Gassaway, 200 N. Harvey, 802 Park Harvey Bldg., Oklahoma City, Oklahoma, Attorney for Plaintiff.

/s/ GRANT E. PRICE

IN THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
SINGLE INCIDENT OR OCCURRENCE

If you should find that the violation of a person's constitutional rights did occur, but that violation occurred only on an isolated occasion, a single incident is not sufficient to prove inadequate training and procedure was provided and you must find for the defendant.

McClelland v. Facteau, 610 F.2d 693, 10th Cir., (1979)

IN THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
AFFIRMATIVE LINK

If the plaintiff has failed to show an "affirmative link" between instances of police misconduct and the adoption of an policy or plan by the defendant City of Oklahoma City, you must find for the defendant.

Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598, (1976)

INSTRUCTIONS TO THE JURY BY THE COURT
(From Transcript of Proceedings of June 3, 1982)

THE COURT: Be seated, please, ladies and gentlemen of the jury. You will recall that there are two remaining portions of this trial, the closing arguments of counsel and the court's instructions with regard to the law. Now, ordinarily in Federal Court, we argue the case by the attorneys first and then the court gives you all of its instructions with regard to the law. The state court procedure is the opposite. The court instructs first and then the attorneys argue, and we have decided and agreed in this case—the attorneys have agreed—to a large extent we will follow the state procedure. In other words, the court will instruct you with regard to the law prior to the time the attorneys make the closing argument in the hopes and

in the expectation that that might be more meaningful to you in understanding their argument after having heard the court's instructions. So I wanted you to know that we are reversing the normal procedure and hope that it is of benefit to you. Therefore, ladies and gentlemen of the jury, I will now proceed to give you all of the closing phase of the court's instructions after which you'll hear the closing arguments of counsel.

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

That's not entirely correct until you have had an opportunity to hear the argument, but it is now my duty to give you the instructions of the court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

This action arises from the events of October 4, 1980, when William Adam Tuttle, the husband of the plaintiff, Rose Marie Tuttle, was shot by Officer Julian Rotramel of the Oklahoma City Police Department in the parking lot of the Will Do Club located at Northwest Tenth and Portland. Rotramel was responding to a police broadcast reporting an armed robbery in progress at the club. Rotramel entered the club and motioned to the bartender,

Vonnie Hinds, to approach. Whereupon, Rotramel questioned Ms. Hinds about the reported armed robbery. Tuttle, who had been inside the club, approached Rotramel as he was standing by the west door and attempted to walk past Rotramel out the door. Rotramel detained Tuttle and continued his inquiry regarding the armed robbery with the bartender, who informed Rotramel that there was no armed robbery occurring. Shortly after Rotramel asked Tuttle to remain inside, Tuttle darted through the door and Rotramel discharged his weapon once striking Tuttle in the lower back.

The plaintiff brought this action in her individual capacity as the administratrix of the Estate of William Adam Tuttle, deceased, against Rotramel and the City of Oklahoma City. The plaintiff has asserted that the decedent was deprived of his constitutional and civil rights in violation of the Federal Civil Rights Act, 42 USC Section 1983. The plaintiff has alleged that Defendant Rotramel under color of state law acted unreasonably reckless and that the reckless actions violated the constitutional and civil rights of the decedent. The plaintiff has further asserted that the City of Oklahoma City should be held responsible because the city acting pursuant to a policy or plan failed to properly train and supervise Defendant Rotramel and other officers, and because the inadequate training and supervision resulting in deliberate indifference to the decedent's rights proximately caused the decedent's death. The plaintiff has also brought a state claim against the defendants for assault and battery.

The plaintiff has sought on behalf of the estate and herself the following damages from the defendants, jointly and separately: $2,134.65 for burial expenses, $984.60

for hospital and medical expenses, $55,000 for loss of consortium and grief as the surviving spouse, $2,000,000 for mental anguish and physical pain suffered by the decedent prior to his death, $455,000 for pecuniary loss, namely loss of future earnings of the decedent, and $250,000 for grief and loss of companionship of the children. The plaintiff has also sought $1,500,000 in punitive damages from the defendant, Rotramel.

The defendants have denied all the allegations of the plaintiff. The Defendant Rotramel has contended that he believed that the decedent was the armed robbery suspect and that the unreasonable and unexpected behavior of Tuttle caused the officer to discharge his weapon and that he acted in good faith in the performance of his duties as a member of the Oklahoma City Police Department. The city has contended that Rotramel was properly trained and supervised and that the death of the plaintiff's decedent did not result from any improper training or supervision of from any official municipal policy or practices.

Now, the foregoing recitation as to the claims of the plaintiff herein and the defenses of the defendants herein are given to you simply to define the issues to be tried between the parties and such statements do not constitute proof of any fact in issue in this case.

Now, there are certain stipulations of the parties. The plaintiff and the defendants have agreed:

1. That on November 24, 1980, the City Clerk of the City of Oklahoma City was given notice of the claim against the city and the Oklahoma City Police Department

and Julian Rotramel pursuant to the Political Subdivision Tort Claims Act;

2. That said notice was timely; and

3. That on October 4, 1980, although an armed robbery in progress was called into the Oklahoma City Police Department, there was in truth and in fact no armed robbery committed at the Will Do Club at Northwest Tenth and Portland on said date.

You are instructed that the parties have agreed to the facts contained in these stipulations and that these stipulations are to be received by you and considered by you as evidence in this case without the need of any testimony thereon.

All right. You're to consider each defendant separately. As the plaintiff has sued two defendants herein and claims that each is liable to her in damages, the jury is instructed that it must consider the evidence and the instructions herein as to each of the defendants to ascertain if the plaintiff has proved her case against each such defendant. The fact that one defendant may be found liable to the plaintiff should not govern another defendant unless the jury finds, under the evidence herein and these instructions, that such other defendant is also liable to the plaintiff. That is to say. that the jury should consider the liability of each defendant to the plaintiff under the evidence and the court's instructions as to the law of the case.

In addition to having separate claims against each defendant, the plaintiff has also asserted several theories of recovery; that is, the plaintiff has asserted claims un-

der the Civil Rights Act against each defendant and has asserted claims of assault and battery against each defendant.

In this regard you are instructed that should you find in favor of the plaintiff on one or more theories of recovery against the defendant, the plaintiff would be entitled to only one recovery of her damages which proximately resulted from the acts or omissions of that defendant.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The City of Oklahoma City is a municipal corporation duly and legally chartered by the state of Oklahoma and is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations stand equal before the law and are to be dealt with as equals in a court of justice.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted into the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in this case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

Now, it is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the court has sustained an objection to a question, the jurors are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the court does not indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and the effect of all evidence. The jury is instructed not to draw any inference for or against either side of the case by any ruling or comment made by the court during the trial.

Now, I have said that you must consider all of the evidence, but this does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, of course, you should consider his or her relationship to the plaintiff or the defendants; his or her interest, if any in the outcome of the case; his or her manner of testifying; his or her opportunity to observe or acquire knowledge concerning the facts about which he or she testified; his or her candor, fairness, and intelligence; and the extent to which he or she has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Now, the testimony of a police officer is entitled to no special or exclusive sanctity. A police officer who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does, and in the case of police officers you should not believe them merely because they are police officers. You should recall their demeanor on the stand, their manner

of testifying, the substance of their testimony, and weigh and balance it just as carefully as you would the testimony of any other witness. People employed by the government, including police officers, do not stand in any higher station in the community than other persons, and their testimony is not entitled to any greater weight.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may

think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

Now, the burden is on the plaintiff to prove every essential element of her claims by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential elements of the plaintiff's claim by a preponderance of the evidence, the jury should find for the defendants as to that claim.

Likewise, Defendant Rotramel has the burden to prove by a preponderance of the evidence his defense of good faith as hereinafter explained in these instructions.

You are instructed that evidence may be either direct or circumstantial. Direct evidence is evidence such as the testimony of an eye-witness, or other testimony based upon actual personal knowledge or observation of the facts in controversy. Circumstantial evidence is evidence of

certain facts from which a jury may deduce the facts sought to be proved, that is, a jury may infer other connecting facts which usually and reasonably follow.

Direct proof of intent—a state of mind—is often not possible and is not necessary for the same may be and usually is proved by circumstantial evidence. If you find that a given act was done by the defendants, the intent with which they acted is to be determined by you from all the facts and circumstances as shown by the evidence in this case.

It is not necessary to find that the defendants had any specific intent to deprive the decedent of his civil rights in order to find in favor of the plaintiff. The plaintiff is entitled to relief if the defendants intended the actions which resulted in a violation of the decedent's rights.

During the course of the trial certain testimony has been shown to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, and the same judgment on your part with reference to its weight, as is the testimony of witnesses who have taken the stand.

Now, the Civil Rights Act. The plaintiff has asserted a claim under the Civil Rights Act, 42 USC Section 1983. The two defendants have different liabilities under this act and different defenses are available to them. Accordingly, this instruction must be read in connection with the instructions I will give you as to the liabilities of the Defendant Rotramel and the defendant, the City of Oklahoma City.

In this case the plaintiff claims damages alleged to have been sustained by the decedent as the result of a deprivation under color of state law of a right secured to the decedent by the Constitution of the United States and by an Act of Congress providing for equal rights of all persons within the jurisdiction of the United States.

Specifically, the plaintiff alleges that the defendants while acting under color of authority of the State of Oklahoma subjected the decedent to the deprivation of rights and privileges secured by the Constitution and Laws of the United States; that is, Defendant Rotramel by his acts deprived the decedent of his right to liberty and life without due process by subjecting him to excessive force in effecting the decedent's apprehension, and the defendant, the City of Oklahoma City, due to the inadequate training of Defendant Rotramel which amounted to gross negligence and deliberate indifference to the rights of the decedent likewise deprived the decedent of his right to liberty and life without due process.

You are instructed as a matter of law that under the Constitution of the United States, every citizen is constitutionally protected against the unlawful or unreasonable taking of his life or liberty and against being subjected to excessive force in his apprehension.

You are further instructed that Title 42, Section 1983 of the U.S. Code provides that any citizen, or his legal representative if deceased, may seek redress in this court by way of damages against any person or persons, who, under color of state law or custom, subjects such citizen to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

In order to prove her claim, the burden is upon the plaintiff to establish by a preponderance of the evidence each of the following elements:

1. That the defendants performed acts which operated to deprive the decedent of his federal constitutional rights previously mentioned;

2. That the defendants then and there acted under color of the authority of the State of Oklahoma; and

3. That the defendants' acts were the proximate or legal cause of the damages sustained by the decedent.

Acts are done "under color" of the authority of a state not only when state officials act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority. In order for unlawful acts of an official to be done "under color of authority," however, the unlawful act must be done while the official is purporting or pretending to act in the performance of his official duty; that is to say, the unlawful act must consist in an abuse or misuse of power which is possessed by the official only because he is an official; and the unlawful act must be of such a nature, and be committed under such circumstances that it would not have occurred except for the fact that the person committing the act was an official purporting to exercise his official powers.

The first aspect of the plaintiff's claim is that the decedent was deprived of his right to liberty and life "without due process of law." To be deprived of one's life and liberty "without due process of law" means to be deprived of such right without the authority of the law. Before the jury can determine whether the decedent was de-

prived by the defendants of his rights "without due process of law," the jury must first determine from a preponderance of the evidence in the case whether the defendants committed the acts alleged, and, if so, whether the defendants acted under the circumstances within or without the bounds of their lawful authority under state law. If the defendants acted within the limits of their lawful authority under state law, then the defendants could not have deprived the plaintiff of any right "without due process of law."

The plaintiff has also claimed that the decedent was subjected to excessive force in his apprehension. In that regard as previously mentioned, you are instructed that every person has the right not to be subjected to unreasonable or excessive force while being apprehended by a law enforcement officer. On the other hand, an officer has the right to use such force as is necessary under the circumstances. Whether the force used was unnecessary, unreasonable or violent is an issue to be determined in the light of all the surrounding circumstances on the basis of that degree of force a reasonable and prudent officer would have applied.

You are instructed that under the rules and regulations of the Oklahoma City Police Department the use of firearms by a police officer is not justified when used:

1. To fire a warning shot;

2. To apprehend a misdemeanor suspect or person committing a misdemeanor;

3. To fire at moving or fleeing vehicles when only misdemeanor or traffic offenses have been committed; or

4. The use of deadly force constitutes a greater threat to innocent human lives than allowing the criminal to escape.

You are further instructed that under the rules and regulations of the Oklahoma City Police Department the use of firearms by a police officer is not justified except as permitted under the justifications as follows:

1. The police officer is justified in using his firearm only in the defense of life in the instances where the suspect is armed and/or making an attempt to kill or do great bodily harm; and

2. When necessary, defined as being essentially as a last resort, committed in retaking felons who have escaped or when necessarily committed in arresting felons fleeing justice.

You are also instructed that under the Oklahoma City Police Department rules and regulations that the use of a firearm by an officer is not justified if an apprehension and/or arrest can reasonably be made without violence. Furthermore the rules and regulations provide that under all circumstances being in mind the value of human life, an officer will exercise the utmost discretion in the use of his weapon.

You are instructed that the law does not permit the use of deadly force by police officers solely because a citizen is found committing a misdemeanor.

You are also instructed that in promulgating a police department manual, the City of Oklahoma City was estab-

lishing official policies and guidelines for the officers to follow.

In determining whether an officer had reasonable grounds to believe that a person has committed an offense, the facts known to him need not meet the standard of conclusiveness upon which a conviction must be based; but rather, the actions of the officer in making an arrest are to be measured by the test of what a reasonable person would have believed under the same circumstances.

In summary, if you find from a preponderance of the evidence in the case after applying these instructions that the plaintiff has proved her claim that the decedent was deprived of his rights to liberty and life without due process of law and was subjected to unreasonable force in his apprehension, then your verdict will be for the plaintiff and against the defendants. On the other hand, if you find that the plaintiff has not proved her claims of constitutional deprivation or that the Defendant Rotramel has proved by a preponderance of the evidence his affirmative defense of good faith as hereinafter explained to you, then your verdict will be for the defendant or defendants and against the plaintiffs.

In order to prevail upon her civil rights claim against the individual defendant, Rotramel, the burden of proof is upon the plaintiff to establish the following elements by a preponderance of the evidence:

1. That the defendant in question acting under color of state law knowingly deprived the decedent of his constitutional right not to be deprived of life or liberty without due process of law or his right not to be subjected to unreasonable force in the manner claimed herein by the plaintiff; and

2. That the acts of the defendant in question were the proximate cause of the injury to the decedent.

In connection with the first element, you are instructed that a police officer of the City of Oklahoma City, Oklahoma, would be acting under color of state law when in the performance of his official duties. If the defendant purported or pretended to act in the performance of his official duty as a police officer, he was acting under color of law. It is the nature of the act performed, not the clothing of the actor or even the status of being on duty which determines whether the officer has acted under color law.

With reference to the second element of these claims as set forth above you are directed to Instruction No. so and so in which I will define and explain proximate cause. I haven't yet numbered those, and I'll come back to that, ladies and gentlemen of the jury, at a later date.

Good Faith Defense of Police Officers

You are instructed that the individual defendant, Rotramel, as a police officer, has raised the affirmative defense of qualified "good faith" immunity to protect him against the claims of the plaintiff that the officer deprived the decedent of his constitutional rights. The defendant has the burden of proving this affirmative defense.

If you find from the evidence that Defendant Rotramel acted with a good faith belief that his actions were within his lawful authority and that reasonable grounds existed for this belief based upon the circumstances existing at the time of his action; and if you further find that this defendant did not know, nor reasonably should have

known, that his actions would violate the constitutional or statutory rights of the decedent; and finally, if you find that this defendant did not act with malicious intent to deprive the decedent of his constitutional rights or other rights, or cause other injury to the decedent, then in the event of these findings, your verdict should be for the defendant Rotramel on the plaintiff's civil rights claim.

Liability of the City of Oklahoma City

If you have found that the plaintiff's decedent was denied any of his civil rights as explained in these instructions, then you should consider whether the City of Oklahoma City is liable for the denial of the civil right in question.

The standards for assessing liability of the city are different from the standards assessing the liability of the individual defendant.

If a police officer denies a person his constitutional rights, the city that employs that officer is not liable for such a denial of the right simply because of the employment relationship. Thus, in this particular case, you are instructed that the City of Oklahoma City is not liable for the deprivation of the decedent's constitutional rights solely because it hired and employed the Defendant Rotramel. But there are circumstances under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.

This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies, or acquiesces in the constitutional

deprivation in such a manner that such constitutional deprivation can be found to result from the execution of a city's official policy or custom.

In the circumstances of the case before you, the City of Oklahoma City can be found to have authorized, sanctioned, or acquiesced in any denial of the decedent's rights only if an official policy which results in constitutional deprivations can be inferred from acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the decedent.

It is the plaintiff's contention that such a policy existed and she relies upon allegations that the city is grossly negligent in training of police officers, in its failure to supervise police officers, and in its failure to review and discipline its officers. The plaintiff has alleged that the failure of the city to adequately supervise, train, review, and discipline the police officers constitutes deliberate indifference to the constitutional rights of the decedent and acquiescence in the probability of serious police misconduct. Furthermore, the policy of placing police officers on duty who were inexperienced and unqualified to act in a particular situation in applying the use of a deadly weapon constitutes deliberate indifference to the rights of the decedent.

The city, of course, has denied the plaintiff's allegations and further denies the existence of an official policy of the City of Oklahoma City which results in constitutional deprivations.

The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An offi-

cial policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of an offensive act.

Absent more evidence of supervisory indifference, such as acquiescence, such an acquiescence—I'm sorry, let me read that over. I'm getting a little thick tongued here. Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability on the City of Oklahoma City under the federal Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to "deliberate indifference" or "gross negligence" on the part of the officials in charge. The city cannot be held liable for simple negligence. Furthermore, the plaintiff must show a causal link between the police misconduct and the adoption of a policy or plan by the defendant municipality.

You are instructed that in order for the City of Oklahoma City to be liable for an act violating the constitutional rights of another under 42 USC 1983, more than a negligent act or failure to act must be shown. The plaintiff must show that the conduct of the municipality was grossly negligent, reckless, or of deliberate indifference and if the plaintiff cannot show such conduct, you are instructed to find in favor of the defendant City of Oklahoma City on the civil rights charge.

A city may not, under the civil law—let me read that again—the city may not under the law assert an affirmative defense of good faith. Accordingly, if the plaintiff proves by a preponderance of the evidence that the City of Oklahoma City knowingly violated the decedent's civil rights under this instruction then you should find for the plaintiff and against the City of Oklahoma City without considering any affirmative defense of good faith. I want to stress that a good faith defense is available, under the Civil Rights Act, is available to the individual defendant. It is not available to the City of Oklahoma City. On the other hand the act requiring, or finding the defendant, individually, Rotramel, individually liable are different from those finding the city liable under that same act.

Gross negligence as used in this instruction demands evidence of near recklessness or shockingly unjustified and unreasonable action while negligence requires only a showing of unreasonableness.

Under the Civil Rights Act a person subjects another to the deprivation of a constitutional right if that person does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that results in the constitutional deprivation complained of.

Furthermore, personal participation is not the only requirement for liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The required causal connection can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actors know or reasonably should

know would result in the constitutional injury being inflicted upon others.

This does not mean that the law recognizes only one proximate cause for an injury or deprivation. On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together to cause injury or deprivation. In such a case, each may be a proximate cause.

Now, malice defined: The word maliciously, as used herein, does not mean hatred, spite, or ill will as commonly understood. The word as used in these instructions means a wrongful act intentionally done without just cause or excuse and not by accident or mistake. Malice can be inferred if you find that the defendant's act with reckless disregard of lawful rights of the decedent were heedless of the necessary results of the act of which the plaintiff now complains, or acted without regard to the propriety or the consequences of their acts.

An act or omission is "knowingly" done if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

You are instructed that suicide is not a defense to either the civil rights claims or the assault and battery claim asserted by the plaintiff. It was admitted and is to be considered by you as bearing only on mitigation of damages and/or as bearing only on whether the officer was justified in determining that his own life was in danger.

Assault and Battery

You are instructed that any intentional attempt or threat to inflict injury upon the person of another, when

coupled with an apparent present ability to do so, and an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an "assault." An assault may be committed without actually touching, striking or doing bodily harm to the person of another.

Any intentional use of force upon the person of another is a "battery." So, the least intentional touching of the person of another, if accompanied by an intentional use or display of force such as would give the decedent reason to fear or expect immediate bodily harm constitutes a "battery."

You are instructed that the plaintiff has asserted a claim of assault and battery against the defendant Rotramel and has contended that the acts of said defendant proximately resulted in the decedent's injuries and death.

You are instructed that the defense of good faith as explained to you in the previous instruction asserted by the defendant Rotramel is applicable to the charge of assault and battery and should be considered by you in this regard.

Should you find for the plaintiff on her claim of assault and battery against the defendant Rotramel, then you are instructed that the defendant, the City of Oklahoma City would also be liable on this claim because at the time of the alleged assault and battery, defendant Rotramel was acting within the scope of his employment as a police officer.

Damages

Damages must be reasonable. If you should find that the plaintiff is entitled to a verdict, you may award

her only such damages as will reasonably and fairly compensate for such injury and damages as you find from a preponderance of the evidence in the case that were sustained as a proximate result of the incident.

If you have found that the decedent's civil rights have been violated, this fact in itself entitles plaintiff to actual damages, even if only nominal damages. Therefore, if you decide that the plaintiff, if you decide for the plaintiff on the issue of liability, you must then fix the amount of money damages which will reasonably and fairly compensate for any harm which was proximately caused by the wrongful conduct of the defendants.

If you find no actual damages have been proved, you may award nominal damages of $1.00. Among the elements of injury and harm which you should consider are:

1. The violation of the constitutional rights of the decedent;

2. The loss of future earnings of the decedent;

3. The physical pain suffered by the decedent prior to his death;

4. The emotional and mental anguish suffered by the decedent prior to his death;

5. Reasonable medical expenses incurred by the decedent prior to his death;

6. The reasonable expense for the burial of the decedent;

7. The loss of consortium and the grief suffered by the surviving spouse, the plaintiff herein;

8. The grief and loss of companionship of the children of the decedent; and

9. Any punitive damages you decide that the plaintiff is entitled to. The elements of these damages and their method of calculation will be explained to you more fully in these instructions.

Damages—Present Worth of Future Loss

If you should find that the plaintiff is entitled to a verdict and further find that the evidence in the case establishes the loss of future earnings, then it becomes your duty to ascertain the present worth in dollars of such future damages, since the award of future damages necessarily requires the payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the estate will in effect be reimbursed in advance of the loss, and so will have the use of money which it would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the estate would reasonably be expected to receive on an investment of the lump sum payment, together with the period of time over which the future loss is reasonably certain to be sustained; and then, reduce it or in effect deduct from the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time; and include in the verdict an amount for only the present worth—that is the reduced amount—of the total anticipated future loss.

Now, inflation and taxes: In considering any element of damage to be experienced in the future you are instructed that you should not take into account any possible effect of present or future inflation one way or another.

Under the law, any award made to the plaintiff in this case is not subject to federal or state income tax. Therefore, in computing the amount of damages which you may find the plaintiff is entitled to recover for the loss of future earnings, the plaintiff is entitled to recover only the net, after tax income. In other words, the plaintiff is entitled to recover only "take-home pay" which you find the estate will lose in the future.

Elements of Damage for Assault and Battery

If you find in favor of the plaintiff on the claim of assault and battery, you are instructed that you must fix the amount of money damages which will reasonably and fairly compensate the decedent for any harm which proximately resulted from the wrongful conduct. Among the elements you should consider are:

1. Any pain, suffering, and mental anguish suffered by the decedent and proximately resulting from the injury in question;

2. The reasonable value of medical expenses incurred, including hospital accommodations and care and the services of nurses, attendants, and ambulance service;

3. Such sum as will reasonably compensate for any loss of future earnings. In determining this last amount you should consider what the decedent's health, physical ability, and earning power were before the incident in question.

Wrongful Death Damages

Elements for the estate: 1. Lost accumulations: the estate's loss of net accumulations which is that part of the decedent's net income from salary after taxes, including pension benefits not excluding income from investments continuing beyond death, which the decedent, after paying his personal expenses and monies for the support of his survivors, would have left as part of his estate if he had lived his normal life expectancy are recoverable. The decedent's normal life expectancy was 37 years. In determining this amount you should consider what the decedent's health, physical ability, and earning power were before the incident in question.

Elements for survivors: 1. Lost support and services: the survivor's loss, by reason of the decedent's injury and death, of the decedent's support and services are recoverable. In determining the duration of any future loss, you should consider the joint life expectancy of the survivor and the decedent and the period of minority of any healthy minor children.

In evaluating future loss of support and services, you shall consider the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the survivor and the replacement value of the decedent's services to the survivor. Support includes contributions in kind as well as sums of money. Service means tasks regularly performed by the decedent for a survivor that will be a necessary expense to the survivor because of the decedent's death.

2. Medical and funeral expenses paid by the survivor: Medical or funeral expenses due to the decedent's

death paid by any survivor are recoverable including the reasonable cost of hospital accommodations and care, the reasonable cost of nurses and doctors, and the reasonable cost of ambulance service. Additional element for the surviving spouse and minor children:

1. Damages of surviving spouse:

The wife's loss of the decedent's companionship and protection, and her mental pain and suffering as a result of the decedent's death are recoverable. In determining the duration of such losses, you shall consider the joint life expectancy of the decedent and the surviving spouse.

2. Damages of the surviving minor children:

The loss by the decedent's minor children of parental companionship, instruction, and guidance and their mental pain and suffering as a result of the decedent's death are recoverable. In determining the duration of such losses, you shall consider the joint life expectancy of the decedent and each of the surviving children.

You are also instructed that the plaintiff may recover for any pain, suffering, and mental anguish suffered by the decedent prior to his death which proximately resulted from the incident.

Now, damages—punitive and exemplary: In addition to actual damages, the law permits the jury, under certain circumstances to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

You are instructed that as a matter of law no one may recover punitive damages against a municipality. Accordingly, punitive damages may in no instance be awarded against the City of Oklahoma City.

If the jury should find from a preponderance of the evidence in the case that the plaintiff is entitled to a verdict for actual or nominal damages, and should further find that the act or omission of the defendant Rotramel which proximately caused actual injury or damage to the decedent was wantonly done, then the jury may, if in the exercise of discretion they unanimously choose to do so, add to the award of actual damages such amount as the jury shall agree to be proper as punitive and exemplary damages.

An act of a failure to act is "wantonly" done if done in reckless or callous disregard of or indifference to the rights of one or more persons, including the injured person.

Whether to make an award of punitive and exemplary damages in addition to actual damages is a matter exclusively within the province of the jury, should the jury unanimously find, from a preponderance of the evidence in the case, that defendant Rotramel's act or omission which proximately caused actual damage to the decedent was wantonly done; but the jury should always bear in mind that such extraordinary damages may be allowed only if the jury should first unanimously award the plaintiff a verdict for actual or nominal damages; and the jury should also bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded or fixed in amount because of any sympathy, bias, or prejudice with respect to any party in the case.

There is no exact rule by which to determine the amount of punitive damages. The amount you fix as punitive damages need bear no particular ratio or relationship to the amount you award as compensatory damages. The amount you fix as punitive damages is the amount as in the exercise of your sound judgment and discretion you find will serve to punish the wrongdoer and deter others.

Now, the fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance, in the event that you should find in favor of plaintiff on the question of liability, by a preponderance of evidence and in accord with the other instructions.

All right. Now, ladies and gentlemen of the jury, I have remaining two simple closing instructions to give to you with regard to your duty to deliberate and how you go about electing a foreman and reporting to the court. I will defer those until the close of argument of counsel, which I will remind you will now take place.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of the City of Oklahoma City through the Oklahoma City Police Department,

Defendants.

JUDGMENT

(Filed June 7, 1982)

This action came on for trial before the Court and a jury, the Honorable Lee R. West District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, take nothing by way of her claims against the defendant, Julian Rotramel, and that said defendant recover of the plaintiff his costs of the action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, recover of the defendant the City of Oklahoma City, the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00), with interest thereon at the rate provided by law, and her costs of the action.

DATED at Oklahoma City, Oklahoma, this 7th day of June, 1982.

/s/ Lee R. West
United States District Judge

Entered in Judgment Docket on June 7.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of The City of Oklahoma City Police Department,

Defendants.

ORDER

(Filed August 11, 1982)

On June 7, 1982, the Court entered judgment pursuant to a verdict rendered by the jury in favor of the plaintiff, Rose Marie Tuttle, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased, and against the defendant, the City of Oklahoma City, in the amount of $1,500,000.00. The jury also found in favor of the defendant, Julian Rotramel, and against the plaintiff.

Subsequent to accepting the jury's verdict, the municipal defendant moved in open court for judgment notwithstanding the verdict pursuant to Rule 50(b), F.R. Civ.P., and for remittitur of damages. The Court denied the motions but directed the parties to file written post-trial motions so that the Court could more properly examine and consider the merits of such motions.

The case now comes before the Court upon written motion by the municipality for judgment notwithstanding

the verdict. The plaintiff has responded by brief in opposition to the motion and has argued that the oral motion made after the verdict was read precludes reurging of the same now; that the municipality is precluded from asserting in its instant motion any grounds which it did not raise in its Motions for Directed Verdict made at the close of the plaintiff's case-in-chief and again at the close of all the evidence; and that the Tenth Circuit decision, *McClelland v. Facteau,* 610 F.2d 693 (10th Cir. 1979), upon which the defendant has relied, does not require the Court to grant the instant motion.

The Court, upon consideration of the submissions and the argument and authority contained therein, finds that while the instant motion is not barred by the Court's previous ruling from the bench denying the municipality's oral motion for judgment notwithstanding the verdict, said motion should be denied for the following reasons.

The defendant has argued that the plaintiff in litigating her claim under 42 U.S.C. § 1983 against the defendant municipality failed to prove that the incident of October 4, 1980, which resulted in the death of the plaintiff's husband was anything more than a single, isolated occurrence or that the defendant municipality had any indication that the training or supervision of its police officers was insufficient prior to October 4, 1980.

In *McClelland,* the Tenth Circuit on a motion for summary judgment regarding the duties and liabilities of police supervisors in a section 1983 action considered the duty of training and establishing departmental procedures separately from the duty of supervising to correct misconduct of which the police supervisors have notice and

stated with regard to the former that "[s]howing that individual officers violated a person's constitutional rights on an isolated occasion is not sufficient to raise an issue of fact whether adequate training and procedures were provided." 610 F.2d at 697. The circuit court however stated further that "[o]nly by countering with evidence that the training or procedures were defective could [the plaintiff] have raised an issue of fact whether this duty was breached." *Id.*

In *McClelland,* the defendants brought forward affidavits and documents showing adequate training and department policies while the plaintiff countered with no evidence to the contrary. In the instant case, the Court finds that the plaintiff brought forward sufficient evidence regarding inadequate training and procedures to warrant submission to the jury of the issue of the municipality's liability for breach of this duty. The issue of notice raised by the defendant goes to a separate duty, namely the duty of supervision to correct misconduct of which a supervisor has notice, and thus, a separate basis for liability.

The standards in the Tenth Circuit for considering a motion for judgment notwithstanding the verdict are set forth in *Barnett v. Life Insurance Co. of the Southwest,* 562 F.2d 15, 17 (10th Cir. 1977), wherein the appellate court stated:

> "The trial court on this motion for judgment n.o.v. by the defendant should have examined the evidence in a light most favorable to the plaintiff, together with the reasonable inferences to be drawn from the facts. The standard to be used by the trial courts is essentially the same as applied for directed verdicts. *See Oldenburg v. Clark,* 489 F.2d 839 (10th Cir.); *Taylor v. National Trailer Convoy, Inc.,* 433 F.2d 569 (10th Cir.); Rule 50(b), Fed.R.Civ.P., and the general common law practice. In *Taylor v. National Trailer Convoy, Inc.,* we held that judgment n.o.v. is proper where '. . . the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable men could not differ as to the conclusions to be drawn therefrom.' We said in *Symons v. Mueller Co.,* 493 F.2d 972 (10th Cir.):
>
> > '. . . A scintilla of evidence is insufficient, of course, to justify submission of a case to the jury. Nevertheless, a directed verdict or judgment n.o.v. may not be granted unless the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made. *Swearngin v. Sears Roebuck & Co.,* 376 F.2d 637, 639 (10th Cir. 1967).'
>
> And in *C. H. Codding & Sons v. Armour & Co.,* 404 F.2d 1 (10th Cir.):
>
> > 'The rule for the granting of a directed verdict has been often repeated. Its essence requires that before a motion for a directed verdict shall be sustained the evidence must be "all one way or so overwhelmingly preponderant in favor of the movant that the trial court in the exercise of its sound discretion would be required to set the verdict aside." *Chicago, Rock Island & Pacific R.R. v. Howell,* 401 F.2d 752. . . .' "

The Court finds upon the foregoing authority that after examining the evidence in a light most favorable to the plaintiff, together with the reasonable inferences drawn therefrom, that reasonable minds could differ as to the conclusions to be drawn from such evidence and thus, that the evidence warranted submission of the issue of the municipality's liability due to inadequate training to the jury.

Accordingly, the defendant's Motion for Judgment Notwithstanding the Verdict is DENIED.

IT IS SO ORDERED this 11th day of August, 1982.

/s/ LEE R. WEST
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV-81-679-W

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of The City of Oklahoma City Police Department,

Defendants.

NOTICE OF APPEAL

(Filed September 10, 1982)

Notice is hereby given that The City of Oklahoma City, defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment entered by this Court June 7, 1982, and the order denying defendant's motion for judgment not withstanding the verdict entered in this action August 11, 1982.

Respectfully submitted,

WALTER M. POWELL
Municipal Counselor

By Richard E. Mahoney
Assistant Municipal Counselor
309 Municipal Building
200 N. Walker
Oklahoma City, Oklahoma 73102
Telephone: (405) 231-2451
Attorneys for the Defendant
The City of Oklahoma City

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 82-2164 & 82-2175

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of William Adam Tuttle, Deceased,

Plaintiff-Appellee
and Cross-Appellant,

vs.

CITY OF OKLAHOMA CITY, a Municipal Corporation; and OFFICER JULIAN ROTRAMEL, Individually and as an Employee of the CITY OF OKLAHOMA CITY through the OKLAHOMA CITY POLICE DEPARTMENT,

Defendants-Appellants
and Cross-Appellees.

Appeal from the United States District Court
for the Western District of Oklahoma

(D. C. No. CIV-81-679-W)
(Filed February 28, 1984)

Carl Hughes, Huges, Nelson & Gassaway, Oklahoma City, Oklahoma (Michael Gassaway, Hughes, Nelson & Gassaway, Oklahoma City, Oklahoma, with him on the brief), for Plaintiff-Appellee and Cross-Appellant Rose Marie Tuttle

Burck Bailey, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma (Warren F. Bickford IV and Margaret McMorrow-Love, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant, Cross-Appellee City of Oklahoma City

Robert E. Manchester, McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma (Susan Talbot, McClelland, Collins, Bailey, Bailey & Manchester, Oklahoma City, Oklahoma, with him on the brief), for Defendant-Appellant, Cross-Appellee Officer Julian Rotramel

Michael C. Turpen, Attorney General of Oklahoma; David W. Lee, Assistant Attorney General, Chief, Federal Division, Oklahoma City, Oklahoma, for Amicus Curiae State of Oklahoma

Diane Pedicord, Oklahoma City, Oklahoma, for Amicus Curiae Oklahoma Municipal League

Before BARRETT, DOYLE and SEYMOUR, Circuit Judges

DOYLE, Circuit Judge

This matter is before us pursuant to 28 U.S.C. § 1291, the regular appeals statute, and 42 U.S.C. § 1983, dealing with the violation of constitutional and statutory rights.

Rose Marie Tuttle was the plaintiff in the court below. She brought this action against the defendants, Oklahoma City and Police Officer Julian Rotramel, individually and as administratrix of the estate of her deceased husband. She alleged deprivation of her husband's statutory and constitutional rights to life and liberty, contrary to 42 U.S.C. § 1983.

The cause was tried to a jury in the United States District Court for the Western District of Oklahoma. A verdict was returned in favor of Mrs. Tuttle in the amount of $1,500,000 actual damages against the City. The jury returned a verdict in favor of the defendant Rotramel, the officer who caused the damage by shooting and killing Tuttle. The jury found in favor of Officer Rotramel because the jury found that he acted in good faith. Oklahoma City has appealed the verdict against it and Mrs. Tuttle appeals the verdict and order to pay costs for Rotramel, the police officer.

This incident took place on October 4, 1980. The decedent William Tuttle was inside, and had been inside, the We'll Do Club in Oklahoma City. A complaint was made reporting an armed robbery in progress at the We'll Do Club. The party who called the police described the alleged robber as a 37 year old male with brown hair and glasses. The description matched Mr. Tuttle, and the parties stipulated that Mr. Tuttle actually made the call. Police Officer Julian Rotramel was dispatched to the Club, and when he arrived there was no armed robbery in progress. The bartender testified that she informed Rotramel that no robbery had occurred. Decedent attempted to leave the Club, and Officer Rotramel told him to stay where he was. Decedent disregarded Rotramel and left. Tuttle did not at any time brandish a weapon. In fact, Tuttle made no overt threat. Nevertheless, Officer Rotramel drew his gun and shot the decedent in the back. The latter was a short distance from the officer and had gone down on one knee. No weapon was found on the decedent; there was allegedly a toy gun which was said to have been found in Tuttle's possession. This was not visible to the officer, but he said

that he was apprehensive that the decedent had a weapon. Decedent died from the gunshot wound very soon after the incident.

A limited number of contentions have been asserted in support of the requested reversal. These are set forth and also discussed below.

1. *The contention that the trial court erred as a result of not directing a verdict against Rotramel on the issue of liability.*

Mrs. Tuttle argues that the facts of the case fail to support Rotramel's claim of good faith, and hence the trial court should not have allowed the issue to go to the jury. We here address this issue.

The good faith defense of police officers charged with constitutional violations was first recognized by the Supreme Court in *Pierson v. Ray*, 386 U.S. 554 (1967). In its most recent pronouncement on the good faith defense, the Supreme Court made clear that an officer's good faith must be judged by an objective standard. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (government officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). *Harlow* reaffirmed the objective standard previously applied, but overruled earlier Supreme Court pronouncements that a subjective component existed as well. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975) ("A school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the consti-

tutional rights . . . of the student"); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with the good faith belief, that affords a basis for qualified immunity"); *Pierson v. Ray*, 386 U.S. at 557 ("If the jury found that the officer reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow, even though the arrest was, in fact, unconstitutional").

An officer's good faith is not an absolute defense to charges; it is an affirmative defense that must be pleaded and proved by the defendant officer. *See Gomez v. Toledo*, 446 U.S. 635; *Martin v. Duffie*, 463 F.2d 464, 468 (10th Cir. 1972).

Under certain circumstances, the facts may negate the good faith defense as a matter of law. If the facts construed in the light most favorable to the defendant officer utterly belie his belief or the reasonableness of it, his defense should not be considered by the jury. *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323, 326 (7th Cir. 1978). Jury instructions on an affirmative defense should only be given if reasonably supported by the evidence.

Defendant Rotramel admitted at trial that he violated Police Department policy in shooting Mr. Tuttle. He testified however, that he believed Mr. Tuttle was a felon reaching for a gun. His belief was supported by some evidence. Officer Rotramel was responding to a report that a robbery had taken place. Apparently, Mr. Tuttle made the report, describing himself and reporting that the robber had a gun. Officer Rotramel testified that he attempted to stop Mr. Tuttle, that a struggle had ensued

and that Mr. Tuttle repeatedly reached for his boot. Officer Rotramel claimed that Mr. Tuttle broke away and was again reaching for his boot, apparently retrieving a weapon, when Officer Rotramel shot him. The other witnesses to the shooting disputed these aspects of Rotramel's testimony. If the jury believed Officer Rotramel, however, it could find that he reasonably believed his response was permitted.

The trial court clearly thought the evidence was sufficient to send the issue to the jury, and the jury apparently believed Officer Rotramel's story. Inasmuch as the jury was properly instructed and since there is evidence which favors Rotramel, we cannot assume that the conclusion was improper. It is not enough that Officer Rotramel's good faith defense does not seem to be strongly supported in this case; we must decline to rule that it was inadequate as a matter of law. There was some evidence that he reasonably believed that his life was threatened and his actions were justified. Accordingly, we affirm the jury's finding that Officer Rotramel acted in good faith and thus deny the contention of Mrs. Tuttle.

2. *The contention of the City that the evidence was insufficient to justify submission to the jury.*

The City insists that the trial court erred in denying the defendant City's motions for a directed verdict and judgment notwithstanding the verdict. Its claim is that the trial judge held the City to a standard of ordinary negligence in failing to train Officer Rotramel, rather than the allegedly required showing of gross negligence or deliberate indifference. The argument is also that a single incident of police misconduct cannot establish

grossly negligent training, and that, in light of the single incident here, the trial court should have granted the City's motion for a directed verdict and for judgment notwithstanding the verdict.

The plaintiff-appellee Mrs. Tuttle argues that extensive evidence, and not the single incident referred to, established the grossly negligent training provided by the City. She argues that virtually all of the evidence established the necessary link between the *inadequate* training and the constitutional deprivation. *Owen v. Haas,* 601 F.2d 1242 (2d Cir. 1979). She claims that the trial judge recognized that gross negligence existed if the City had actual or imputed knowledge of the almost inevitable consequences that arise from completely inadequate training or supervision. See *Leite v. City of Providence,* 463 F.Supp. 585, 590-91 (D.R.I. 1978). We agree that Judge West properly denied the City's motions and properly submitted the issue to the jury.

3. *Appellant's further contentions that the Judge's instructions to the jury were erroneous and that the judgment should be set aside because of these alleged error or errors.*

The argument of the City, taken as a whole, is that the jury instructions did not articulate the law governing the case. Particularly, the City challenges the instruction to the jury that it could find for the plaintiff based upon a single incident of the use of force, from which the jury could infer inadequate training. The plaintiff-appellee, Mrs. Tuttle, contends that the sufficiency of the instructions is not usually to be determined by error in any single instruction, but rather by viewing the charge as a whole. *United States v. Jenkins,* 701 F.2d 850 (10th Cir.

1983). We regard the challenged instruction to be proper, and we consider that the instructions, taken as a whole, properly state the law of municipal liability and affirmative defenses. Apart from the killing incident, there was adequate evidence. Even the officer admitted the inadequacy of the training.

There was much complaint on the part of the City to the effect that the standard of wrong-doing submitted by the court was that of ordinary negligence. However, the instructions given do not agree with this. The instruction which addresses the applicable standard of gross negligence and other elements of the claim is as follows:

> You are instructed that the City of Oklahoma City is not liable for the deprivation of the decedent's constitutional rights solely because it hired and employed the defendant Rotramel. But there are circumstances under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be liable.
>
> This occurs when a city implicitly or tacitly authorizes, sanctions, ratifies, or acquiesces in the constitutional deprivation in such a manner that such constitutional deprivation can be found to result from the execution of a city's official policy or custom.
>
> In the circumstances of the case before you, the City of Oklahoma City can be found to have authorized, sanctioned, or acquiesced in any denial of the decedent's rights only if an official policy which results in constitutional deprivations can be inferred from acts or omissions of supervisory city officials and if that policy was a proximate cause of the denial of the civil rights of the decedent.
>
> It is the plaintiff's contention that such a policy existed and she relies upon allegations that the City

> is *grossly negligent* in training of police officers, in its failure to supervise police officers, and in its failure to review and discipline its officers. The plaintiff has alleged that the failure of the city to adequately supervise, train, review, and discipline the police officers constitutes *deliberate indifference* to the constitutional rights of the decedent and acquiescence in the probability of serious police misconduct. Furthermore, the policy of placing police officers on duty who were inexperienced and unqualified to act in a particular situation in applying the use of a deadly weapon constitutes deliberate indifference to the rights of the decedent.
>
> The City, of course, has denied the plaintiff's allegations and further denies the existence of an official policy of the City of Oklahoma City which results in constitutional deprivations.
>
> The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions, if the inaction amounts to deliberate indifference or to tacit approval of an offensive act. (Emphasis supplied.)

Contrary to the present contention of appellant, the trial judge, in outlining the standard, required proof of the City's *gross negligence*. The jury was told that inadequate training of Rotramel amounting to gross negligence and deliberate indifference to the rights of the decedent was necessary in order to deprive the decedent of his right to liberty and life without due process. In other words, the gross negligence standard was plainly set forth as it pertains to the civil rights claim under § 1983.

The instructions were not erroneous. The gross negligence-indifference standard was sufficient as instructed.

As a result the court was correct in denying dismissal relief to the City.

4. *The appellant City's argument that the alleged liability of the City is based only on training and supervision arising out of a single incident.*

The city cites case law in support of the doctrine that a single incident is not adequate evidence to establish liability for inadequate training and supervision. *McClelland v. Facteau,* 610 F.2d 693, 696 (10th Cir. 1979). There it is noted that a police chief could be held liable if he neglected his duty to train subordinates and establish department procedures. He must provide protection for constitutional rights and supervision to correct misconduct of which he has notice. The showing that the individual police officer may have violated the law on an isolated occasion was said not to be sufficient to raise an issue of fact for purposes of imposing liability on police chiefs for failure to train subordinates and establish department procedures that would provide protection for constitutional rights. The court added that there was a genuine issue of material fact as to whether defendant police chiefs violated the duty of supervision to correct misconduct of which they had notice.

Although *McClelland* case is entirely different from the case at bar, involving as it does police chiefs failing to supervise, the principle is much more difficult to establish than the violation here. The act here was so plainly and grossly negligent that it spoke out very positively on the issue of lack of training, the problem which is presented. We are not to be understood as holding that there exists a guarantee that all persons whose constitutional rights are violated by municipal employees will recover

from the City. Our holding requires proof of a city's violation of its duty such as to constitute deliberate indifference to the rights of its citizens. Here there was plenty of independent proof of lack of actual training. In this case the individual defendant had been on the police force for a very short period of time; moreover, he admitted his lack of training to cope with robberies. Nevertheless, he was allowed to go in on a suspected robbery by himself. Also, his gross failure to successfully handle the problem clearly demonstrated his complete lack of training and also his lack of ability. Thus, the incident itself, as well as independent evidence, attested to the officer's lack of knowledge and ability. He claims to have considered Tuttle to be a robber but instead of pursuing him for the purpose of questioning, he fatally shot him without the least justifiable provocation. The single incident rule is not to be considered as an absolute where the circumstances plainly show a complete lack of training.

Our conclusion must be that this action, coupled with the clearly inadequate training, demonstrate the City's gross negligence and deliberate indifference to the rights of the decedent.

5. *The Damages Requested by Plaintiff*

The plaintiff has sought on behalf of the estate and herself the following damages from the defendants, jointly and separately. The trial court described the plaintiff's alleged damages as follows:

> $2,134.65 for burial expenses;
>
> $984.60 for hospital and medical expenses;
>
> $55,000.00 for loss of consortium and grief as the surviving spouse;

$2,000,000.00 for mental anguish and physical pain suffered by the decedent prior to his death;

$455,000.00 for pecuniary loss, namely loss of future earnings of the decedent, and,

$250,000.00 for grief and loss of companionship of the children.

The plaintiff also sought $1,500,000.00 in punitive damages from the defendant Rotramal.

We have called attention to the numbers which were contained in the complaint of the plaintiff and which the judge mentioned in his instructions for the purposes of explaining, in part at least, how the jury arrived at the verdict returned. This court is not in a favorable position to issue a remittitur with respect to these damages.

The judgment of the district court should be and the same is hereby affirmed.

Nos. 82-2164 and 82-2175

ROSE MARIE TUTTLE, etc. v. CITY OF OKLAHOMA CITY, etc., et al.

BARRETT, Circuit Judge, concurring:

I concur because I am convinced the trial court properly and adequately instructed the jury. Even so, I am at a loss to ascertain the basis for the jury's obvious finding that Officer Rotramel was so lacking in training to cope with robberies that such constituted *proof* of Oklahoma City's violation of its duty to train Officer Rotramel to the extent that, as the opinion pinpoints it, it amounted to Oklahoma City's "deliberate indifference to the rights of its citizens."

I have not been able to ascertain what facts the jury relied on to render Officer Rotramel's actions unreasonable. The factual background, as I view it, consists of the

false call placed by Mr. Tuttle about the robbery at the Club involving an armed person who met his description, Officer Rotramel's immediate confrontation with Mr. Tuttle upon entering the Club, Rotramel's identification of Tuttle as the reported armed robber, Rotramel's testimony that he saw Tuttle reach down at which time Tuttle was ordered to stay put, Tuttle's hurried exit from the Club in the darkness with Officer Rotramel in pursuit, the fatal shooting by Rotramel when he observed Tuttle bent down near a vehicle and reaching for that which Rotramel believed to be a gun, and finally the discovery of a toy pistol on Mr. Tuttle's person following the shooting. Beyond this, I have not been enlightened with the factual basis of Oklahoma City's "deliberate indifference" in the context of the facts of this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

ROSE MARIE TUTTLE, Individually and as Administratrix of the Estate of WILLIAM ADAM TUTTLE, Deceased,

Plaintiff,

vs.

CITY OF OKLAHOMA CITY, a municipal corporation, and OFFICER JULIAN ROTRAMEL, Individually and as an employee of the City of Oklahoma City Police Department,

Defendants.

PORTIONS OF TRANSCRIPT OF JURY TRIAL

(p. 23) Mr. Gassaway: May I proceed, your Honor?

The Court: Surely.

Vonnie Hinds called as a witness, having first been duly sworn, testified as follows:

Direct Examination

(p. 24) Q. Will you state your full name for the court and record, please ma'am?

A. Vonnie G. Hinds.

Q. And where do you reside?

A. 3828 Southwest 25th.

Q. And how old a woman are you?

A. 43.

Q. Are you employed?

A. Yes, I am.

Q. Where are you employed?

A. Walnut Creek Nursing Home as a cook.

Q. How long have you been so employed?

A. Since the first of February.

Q. 1982?

A. Yes.

Q. On October 4, 1980, were you at the Will Do Club?

A. Yes. I was on duty.

Q. Will you tell us where the Will Do Club is located?

A. On the corner of Tenth and Portland.

Q. North Tenth and Portland?

A. Yes.

Q. What were you doing at the Will Do Club on October 4, 1980?

A. I was reporting to work as a bartender.

Q. Will you briefly describe your duties as a bartender?

A. Mixing drinks, waiting on customers, cleaning tables, (p. 25) socialize with the people that come in.

Q. What time did you arrive at the Will Do Club on October 4, 1980, if you can recall?

A. Approximately 3:00 or 3:30, somewhere around there.

Q. Did you observe William Adam Tuttle in the club any time during that day?

A. Yes, I did. He was in off and on all day.

Q. Prior to October 4, 1980, did you know William Adam Tuttle?

A. Yes, I did.

Q. When did you first make his acquaintance?

A. I knew Bill about two years, approximately two years.

Q. And were you a social friend of his?

A. We were all good friends.

Q. Okay. On October 4, 1980, had William Adam Tuttle had anything to drink?

A. He had been drinking.

Mr. Gassaway: Now, may I approach this witness, your Honor?

The Court: Surely.

Q. Ms. Hinds, I want to draw — I'm not much of a drawer — but I would like to draw roughly the Will Do Club, if that's okay. Ms. Hinds, I've drawn a square in the middle of that white piece of paper. Would that be a fairly accurate, a fairly accurate representation of the physical shape of the Will Do Club?

(p. 26) A. That's close.

Q. Do you have your bearings as to which is north, south, east, and west?

A. Yes.

Mr. Hughes: Excuse me, your Honor, may I speak with Mr. Gassaway?

The Court: Sure.

Mr. Gassaway: Your Honor, I apologize. May I take care of this one matter here?

The Court: Sure.

Mr. Gassaway: May I approach the bench, your Honor?

The Court: Sure.

(Whereupon, the following conference was had at the bench out of the hearing of the jury:)

Mr. Hughes: Concerning the records, we were contacted by R. Eugene Griffin of the City of Oklahoma City

Police Department. He advised he would have the records here. Yesterday afternoon we had entered into an agreement with Captain Adams — he's head of the Oklahoma Police Training Academy — to advise the witnesses to be on a 15 or 20 minute call. He would provide anyone we needed. We called at 8:15 this morning and said either Griffin or anyone else could bring the records. We also called the main office and left a message.

(p. 27) Mr. Hughes: Now, they say—

The Court: Wait just a minute. We can't take everyone at the same time.

Mr. Hughes: Excuse me, your Honor, but our investigator just called and they said they had no responsibility for these people. We had instructed that they be down here this morning, so we could have these witnesses ready to go, and they told us that they were having some graduation ceremonies this morning, and they asked our indulgence. We agreed that we didn't want to mess up their graduation ceremony, but we subpoenaed Captain Adams to bring certain documents and records. Then they tell us that Captain Adams isn't the custodian of those records, or somebody else is, and Captain Adams is the custodian. We issued a subpoena for Captain Adams and he says, I'm not the Custodian either, after these people tell us he was, and I don't —

The Court: Wait just a moment. Mr. Adams is —

Mr. Hughes: Training Academy.

Mr. Mahoney: Officer Adams is the Commander of the Police Training Academy. He is the custodian of anything used in Police Training, that's what he is bring-

ing. Captain Griffin is custodian of the records of the Police Department for reports and —

The Court: Let me ask you this: Did you all know what the Plaintiffs wanted, which records, and which —that they wanted?

Mr. Hughes: Here's the subpoena.

The Court: I don't want any games played about who is in charge. Do you know what they wanted, and do you know who has them?

Mr. Mahoney: I know Captain Adams has custody of the records if they want —

The Court: I shouldn't have to referee a bunch of Who Shot John, about you subpoenaed the wrong guy. You all know what they want and who has it. Get it over here.

Mr. Mahoney: Okay. What items did you want?

Mr. Gassaway: Exactly what was served and what's on the subpoena.

The Court: Let me ask you this: Does Neal Adams have everything you want?

Mr. Gassaway: We assume.

Mr. Hughes: Griffin.

The Court: Griffin. I want both here with what they're asking for by 10 o'clock this morning.

Mr. Hughes: Do you need the subpoena to comply with it?

The Court: Wait just a moment.

Mr. Mahoney: I'm going through this — the tape of William Adam Tuttle and Rose Marie Tuttle—this was

(p. 29) destroyed. It was destroyed the first of '82 before it was asked for. She was given notice to pick it up. She did not pick it up.

Mr. Hughes: She was —

The Court: You'll have an opportunity to explain that. He's got to bring everything that he has.

Mr. Hughes: Let's get somebody to testify it's been destroyed.

Mr. Mahoney: Well, now, the dispatcher's statement —

Mr. Hughes: Your Honor, the problem with the dispatcher tape is the tape itself has audible signatures on it that show that the tape had been turned on and then turned off, and they're very audible on the tape, and it clearly was edited, and the Court's Order was not for an edited tape.

The Court: We'll take that up later. What I want is to get everything over here that have the items that were subpoenaed.

Mr. Mahoney: Sir, the only thing here's the City Police Department Manual. I have given copies, all the relevant copies asked for.

The Court: Do you have an agreement on that?

Mr. Mahoney: That's all that's left.

Mr. Hughes: We have got copies of certain sections of the Police Department Manual. We want a Police Department Manual.

The Court: Had you furnished the Police Manual or just—

Mr. Mahoney: Same ones. I copied off—

Mr. Hughes: The sections of that Police Manual did not provide us with what I intend to interrogate the witness over.

The Court: Oh, you didn't give him a complete copy? Give him a complete copy. You can get a copy.

Mr. Hughes: We also need somebody to sponsor these exhibits. It's my understanding they wouldn't waive identification of them.

Mr. Mahoney: All right. Well, I gave — at least the same exhibits. I've had the —

The Court: Let's go ahead, gentlemen. Let's don't get into any unnecessary fights. Well, if you're waiving identification, you don't need the custodian of the records.

Mr. Gassaway: If he waives identification of every item on there — what about when and why this was destroyed and about why —

The Court: You'll need a witness over there who would testify about when and how the property was destroyed. They'll need a person or someone who can explain that.

Mr. Mahoney: Who do you want to —

(p. 31) Mr. Gassaway: I don't know, whoever did it.

Mr. Mahoney: Do you still need Captain Adams or Captain Griffin?

Mr. Gassaway: Yes, sir.

The Court: Okay. Let's go gentlemen.

(The following proceedings were had within the hearing of the jury:)

The Court: Go ahead.

Q. Ms. Hinds, does the Will Do Club have any windows?

A. One small one in the back storeroom, but that's all.

Q. No visible windows one can see to look into the premises?

A. No.

Q. And does the front door have a spring on it to keep it shut every time it's opened?

A. It did at that time, yes.

Q. So would it be fair to categorize the building as a blind building? In other words, you can't see in from the outside?

A. Yes.

Q. Okay. Now, I've drawn in a little line there from the door down south. Would that be a fair rough description of the sidewalk there?

A. Yes, it is.

Q. All right. Now, on the 4th day of October, 1980, at approximately 8:00, did you have occasion to observe a police officer come into the premises?

(p. 32) A. Yes, I did.

Q. And would you tell the jury briefly about what you first observed?

A. Well, he just walked in and he motioned for me to come to the door.

Q. Now, did he come in the west door?

A. No. He come—Yes, west side, front door.

Q. And what did you observe about his demeanor? Did he appear to be nervous?

A. No. He just walked in and kind of looked around and wanted me to come to the front door.

Q. All right. Did he have his gun drawn?

A. No, sir.

Q. And did you obey his command to come to the front door?

A. Yes, I did. I asked Beverly Hayes to get behind the bar and I walked around the bar and down to the front door.

Q. And did you have a conversation with the officer at that time?

A. Yes, I did.

Q. And what, if any, conversation took place?

A. He asked me if I was having any problems there, and I told him, no, and he said there was, they had just got a burglary report, a call of a burglary being in progress there.

Q. Armed robbery in progress?

A. In progress and I laughed, and I said, "Not here," and I (p. 33) said, "everybody's having a good time."

Q. And approximately how many people would you estimate were in the club at that time?

A. About 10, 15 people, closer to 15.

Q. And did you know many of the people in the club?

A. Quite a few.

Q. And after you told him that he must have the wrong place, that there's nothing wrong there, what, if anything, happened next?

A. Well, Bill then walked up behind me and started to go out the door.

Q. Now, would "Bill" be William Adam Tuttle?

A. Yes.

Q. And when he started to go out the door, what occurred?

A. The officer asked him to wait a minute until he finished talking to me.

Q. And did Mr. Tuttle wait?

A. He said, "Okay," and he stood there for a second.

Q. All right. And then what did the officer — at this time was the officer restraining Mr. Tuttle in any way?

A. No.

Q. Did he have his hands on him?

A. No, he did not.

Q. Did he interrogate him?

A. No. He just said to wait.

(p. 34) Q. Did the officer appear to be suspicious of the man, watching him or anything?

A. He was talking to me.

Q. Did William Adam Tuttle do anything unusual or suspicious?

A. Right after that, he took off out the door.

Q. Okay. But before he took off out the door, did he do anything like talk mean to the policeman?

A. No, sir.

Q. Did he make any gestures of any sort?

A. No.

Q. Did he make any movements like he was trying to go for a weapon of any sort?

A. No.

Q. Now, when the officer turned back around to talk to you, what did he say to you?

A. He just started talking about was I sure that there was no problem there.

Q. And where were the three of you standing?

A. Right there in front of the west door. The officer was to one side, I was right in the middle, and Bill was on the other side.

Mr. Gassaway: May I approach this witness, Your Honor?

The Court: Surely.

Q. Ms. Hinds, I'll hand you what's been marked for (p. 35) identification purposes as Plaintiff's Exhibit 4-A and ask you what the photograph purports to be?

A. It's a picture of the front door coming into the club.

Q. Ms. Hinds, will you put three "X's" where the three of you were standing? Does that show up?

A. Yes.

Q. Okay. And this is at the west door approximately right here; is that correct?

A. Yes.

Mr. Gassaway: We move for the admission of Exhibit 4-A.

The Court: No objection. Be admitted.

Mr. Gassaway: May I approach the witness one moment again, Your Honor?

The Court: Sure.

Q. Ms. Hinds, I'll hand you what's been marked for identification purposes and introduced as Plaintiff's Exhibit 4-A, can — you've made three "X's" — can you hold it up to the jury and show which "X" is who?

A. Well, the police officer was standing right here. I was right here in front of him and Bill was right here to the side of me by the door.

Q. Where's the door?

A. Right here.

Q. Right here. Okay. Thank you. Now, did you have the (p. 36) opportunity to observe the officer and the deceased, William Adam Tuttle, standing there side by side?

A. Yes, pretty much so. I was right in front of them.

Q. Will you tell the jury how they compared in size?

A. He looked a good two heads taller than Bill.

Q. The police officer?

A. Yes.

Q. And did the police officer ever appear nervous prior to Bill going out the door?

A. No. Other than just telling him to wait there.

Q. Now, did he go out the west door?

A. Yes.

Q. And what happened next?

A. Bill, in my opinion, darted out the door, and the officer whirled around after him. He had his hand on his gun and just whirled around.

Q. Did you hear the officer say anything?

A. I don't know what he said.

Q. Did you hear anything like, "Halt"?

A. No.

Q. "Stop"?

A. No.

Q. "You're under arrest"? "Wait a minute"?

A. No, I did not.

Q. Anything — if there would have been anything loud, would you (p. 37) have been able to hear it?

A. Yes.

Q. And then what happened, Ms. Hinds?

A. He had the door propped open with his foot and he fired, and the officer turned around and came back in and motioned for me to come back, to come outside immediately.

Q. Did he try to chase him down at all?

A. No. He just whirled.

Q. Ms. Hinds, what kind of man was William Adam Tuttle?

A. He was a friendly sort of guy. I mean he never bothered anybody. He wasn't violent.

Q. Had you ever known him to have any weapons of any sort?

A. No.

Q. Did you say anything to the policeman when you went outside?

A. I did after I got outside. I asked him why he shot him, he didn't do anything.

Q. Did Mr. Tuttle appear to be baiting the police officer into shooting him in any way?

A. Not—there was no indication of any trouble going on or nothing like that.

Q. How would you describe the police officer after the shooting? What was his demeanor?

A. To me he was just indifferent. He was doing his job.

Q. Did he appear to be shook up at all?

A. Not to me he didn't. He was more concerned about getting me (p. 38) outside.

Mr. Gassaway: May I approach the witness again, your Honor?

The Court: Surely.

Q. Thank you. Ms. Hinds, I'll hand you what's been marked for identification purposes as plaintiff's Exhibit 4-B, and I'll ask you what the photo shows?

A. The front door at the corner of the building.

Q. And does that accurately depict the distance from the front door of the building to the south sidewalk?

A. Yes.

Q. And although the building is a different color, are the dimensions the same as they had been?

A. Yes.

Q. The building hasn't changed?

A. No. Huh-uh. They just—

Q. I'll hand you what's been marked for identification purposes as plaintiff's 4-C and ask you if that's a view from the south sidewalk back up to the door?

A. Yes, it is.

Q. And that's at the Will Do Club?

A. Yes, it is.

Q. I'll hand you what's been marked for identification purposes as plaintiff's Exhibit 4-D and ask you if that's the same view from the south sidewalk up to the door on the night of (p. 39) October 4, 1980?

A. Yes.

Q. And does anything unusual appear to be down at the south end of the sidewalk?

A. There's blood on the ground.

Q. And I'll hand you what's been marked for identification purposes plaintiff's Exhibit 4-E and ask you if this is a photograph that shows the view from the south edge of the sidewalk back to the east?

A. Yes, it does.

Q. I'll hand you what's been marked for identification purposes as plaintiff's Exhibit 4-F and ask you what that photograph shows?

A. Blood all over the ground.

Q. Whose blood is that?

A. Bill's.

Q. And was that there on that night?

A. Yes.

Q. Did you have to clean that blood up?

A. Yes, I did, the next morning.

Q. What did it take to get that blood up?

A. Three big gallon jugs of bleach.

Q. Finally I'll hand you what's been marked for identification purposes as plaintiff's Exhibit 4-G and ask you if that's a different view of that same thing?

(p. 40) A. Yes, it is.

Mr. Gassaway: Your Honor, we'll move to admit plaintiff's Exhibits 4-B through 4-G.

Mr. Mahoney: We object to 4-B and C.

The Court: All right. The others will be admitted. May I see counsel at the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

The Court: Wait just a minute. We need Mr. Gassaway. What is the basis of your objection?

Mr. Mahoney: Taken in the daytime, sun is different, doesn't reflect what it was like at the time of the shooting.

The Court: Different?

Mr. Mahoney: Different color, repair and such like that, and the sidewalk, to show the sidewalk scene that night.

The Court: All right. Objection will be overruled. They'll be admitted.

Mr. Gassaway: Thank you, your Honor.

(The following proceedings were had within the hearing of the jury:)

Q. Now, you specifically told Officer Rotramel that there was not an armed robbery in progress, did you not?

A. Yes, I did.

(p. 41) Q. And he didn't appear to misunderstand you, did he?

A. No. I'm sure he understood me.

Q. Made yourself clear?

A. Yes.

Q. You didn't appear to be nervous or anything?

A. No.

Q. What did you think when he came in and asked you if there was an armed robbery?

A. I was very surprised.

Q. Okay. Would you characterize William Adam Tuttle as being a suspicious person?

A. No.

Q. After the police officer asked you to come outside and you asked him why he shot him because Bill Tuttle didn't do anything wrong, what happened next?

A. Another officer ushered me over to a scout car and told me I had to get in, and I asked him why, and he said I had to go downtown.

Q. All right. And did you?

A. I told him I didn't want to go downtown. I didn't have anything to say.

Q. What were you told?

A. I was told to get in the scout car or I would be arrested and held in jail.

Q. And then did you go downtown?

(p. 42) A. Then I went and got in the scout car.

Q. Were you pretty shook up at that time?

A. I sure was.

Mr. Gassaway: I believe that's all.

The Court: Mr. Mahoney, cross-examination?

Mr. Mahoney: Can I see Exhibit 4-A? Could I give this to the witness, please?

Cross-Examination

By Mr. Mahoney:

Q. Ms. Hinds, were you working at the Will Do Club that night?

A. Yes, I was.

Q. And you're a bartender?

A. Yes, I am, or was at that time.

Q. When the officer entered the club, did you have a suspicion why the officer was there?

A. No. I just thought they were going to make a routine check. They come in and check bar cards and club cards and such things, make sure you've got them.

Q. So when you first saw the officer, you thought he was checking to see if there were any club violations?

A. Yes.

Q. All right. What did you do when the officer entered the club?

A. My bar card had expired that day, so I asked Beverly to get behind the bar.

(p. 43) Q. Who is Beverly?

A. Beverly Hayes is the manager of the club.

Q. All right. And what did you do?

A. Well, that's when the officer motioned for me to come to him. And then I went down, I went out around the counter.

Q. Stayed behind the bar? Stayed behind the bar when the officer entered?

A. No. No, I went to the end of the bar.

Q. And did you—

A. The far end of the bar.

Q. Did you move out from behind the bar?

A. Yes and walked around to the front door.

Q. On that picture in front of you, Plaintiff's Exhibit 4-A, is there a telephone in that picture?

A. Yes, there is.

Q. Had you seen William Adam Tuttle use that telephone that night?

A. Yes. He had used the phone several times.

Q. When was the last time you saw him use the phone?

A. Oh, I guess, about 20 minutes, maybe 10 minutes before this happened. I don't know exactly, because he was off and on on the phone.

Q. Okay. Were you serving drinks to Bill Tuttle that night?

A. Yes, I was.

Q. What were you serving?

(p. 44) A. He was drinking whiskey and Club Coke.

Q. How long had you been there, off and on?

A. No. I got there at 3:00 because I usually got up a little early, sat and talked to people who were there, and he was in and out that period of time before I went on duty at 5:00.

Q. Was he drinking all the time?

A. Not steady. He was drinking, but not steady.

Q. How much had he drunk?

A. I take different amounts to different people.

Q. How much did he drink?

A. Since I got there?

Q. Yes, since three o'clock when you got there?

A. Not exactly a lot. He had been drinking, but not heavy.

Q. All right. When did—did you give a statement to the police after this incident occurred on October 4th?

A. Yes, I sure did.

Q. Did you speak with William Adam Tuttle after he made the last phone call?

A. Yes, I did.

Q. Was his behavior any different?

A. Yes, he come back down to the bar. He ordered a double shot of bourbon and coke. And he was shaking

and I asked him what was wrong and he said, "nothing anymore," and I asked him to move because he was sitting in someone else's place.

Q. And that was right after he used the phone?

(p. 45) A. Shortly after that.

Q. How long was it after he used the phone that Officer Rotramel arrived?

A. I really couldn't say for sure. It wasn't too long, I don't believe.

Q. Did Officer Rotramel motion for William Adam Tuttle to approach him?

A. No. He just motioned for me to come to the door. Bill was walking up to the door behind me.

Q. Did Bill walk right up to Officer Rotramel?

A. No. He started to go out the door.

Q. And was he stopped?

A. Pardon?

Q. Was he stopped by Officer Rotramel?

A. Yes.

Q. What was Bill Tuttle wearing that night?

A. Kind of a colored shirt, I believe, rose-tinted glasses, and I'm not sure if he had jeans on or dress pants. I couldn't say for sure.

Q. What color hair did Bill Tuttle have?

A. Sort of a sandy brown.

Q. All right. Did you hear any conversation between Officer Rotramel and William Adam Tuttle?

A. All I heard him say was wait till I finish talking with me.

Q. Okay. You heard him saying that to Bill Tuttle?

(p. 46) A. Yes.

Q. Did you—did they have any other words between them?

A. No, sir.

Q. All right. And how long was it from when Bill Tuttle approached Officer Rotramel to when he took off out the door?

A. Well, he stood there just for a few seconds and then he darted out the door, and the officer whirled with his hand on his gun behind him.

Q. Did you hear Officer Rotramel say anything to William Adam Tuttle when he went out the door?

A. He said something, but I don't know what it is. I don't know what he said.

Q. Okay. Was the music playing in the bar at this time?

A. Of course.

Q. How loud does the music play in a little bitty club?

A. Not real loud because I didn't like it real loud.

Q. When Bill Tuttle took off from where you were standing and Officer Rotramel whirled after him, was he facing him or was his back to Officer Rotramel?

A. He was facing me.

Q. So when Bill Tuttle—

A. Bill was to the side of me.

Q. All right. When he said something to—that you didn't hear—to William Adam Tuttle, was he facing you when he said that?

(p. 47) A. When Bill darted out the door and he whirled around after him, I started backing up away from the door to get away from the door.

Q. How far did you back up?

A. I was almost to the center of the room when the gun was fired.

Q. Okay. Did you see where William Adam Tuttle was when the gun was fired?

A. Only after the officer had me go back outside.

Q. So William Adam Tuttle was out of your view when Officer Rotramel fired, is that correct?

A. Yes.

Q. Okay. Did you ever see Officer Rotramel put his hand on William Adam Tuttle in the club?

A. No.

Q. Ms. Hinds, are you friends with the plaintiff, Rose Marie Tuttle?

A. Yes, I am.

Q. You know her socially?

A. We've of—I've known her about close to five years.

Q. Longer than you've known William Adam Tuttle?

A. Yes.

Q. Have they ever lived with you?

A. Yes, they did.

Q. When did they?

(p. 48) A. Oh, Lord, I don't know for sure, but it was a couple of years ago, I'd say for, I'd say about six months or so before all this happened, possibly eight months.

Q. Okay.

A. They'd just moved back to town and they stayed with me then.

Q. Are you familiar with their, when they're having fights and when they're getting along well?

A. I don't know anybody that don't have quarrels.

Q. Well, between these two people were you familiar with their having fights?

A. I wasn't around them all that much.

Q. Did you know of instances where they had fights with each other?

A. Everybody knew they quarreled, yes.

Q. Okay. Had they had a fight on October 4, 1980?

A. It was—to my understanding there was a disagreement, yes.

Q. Did William Adam Tuttle speak to you about that fight with Rose on that night?

A. Yes, he did.

Q. What did he say?

A. He just said they were arguing again.

Q. Had they ever separated before?

A. Yes, a time or two.

Q. When was the last—when was—before the shooting when was the last time they had separated?

(p. 49) A. They were just getting back together. They had been back together, I guess, maybe possibly two or three weeks before this. I'm not sure.

Q. Okay. Was William Adam Tuttle living in Oklahoma City with Marie, Rose Marie at the time this happened?

A. Yes. He was staying there.

Q. How long had he been staying with her?

A. I really don't know because I wasn't around him much at that time.

Mr. Mahoney: No more questions, Your Honor.

The Court: Redirect?

Redirect Examination

By Mr. Gassaway:

Q. You said that William Adam Tuttle had something to drink, didn't you?

A. Yes, I did.

Q. I believe you said it was bourbon?

A. Yes.

Q. And if they were—everyone was standing face to face like that, would the officer, or should the officer have been able to smell alcohol on his breath?

A. Yes. He'd been there long enough that you could have smelled it.

Q. Now, while they were inside, you didn't ever see William Adam Tuttle go for a boot or anything, did you?

(p. 50) A. No.

Q. And when you were talking to the officer and you heard Bill say, why do I have to stay here to the officer, you all were speaking in, would you characterize it as normal conversation voice?

A. All Bill said was, "okay."

Q. I mean you were talking to him and the officer was talking?

A. Everyone was talking just like I'm talking now more or less. Maybe I'm a little shaky now, but—

Q. No one was shouting?

A. No.

Q. And the club is a pretty small club, isn't it?

A. Yes.

Q. And if one were to have yelled, you would have been able to hear it, wouldn't you?

A. Yes. I would have heard it, I'm sure.

Q. But whatever Officer Rotramel said to him on that night, he didn't say it loud enough for you to hear it, did he?

A. No, he said something, but I don't know what it was.

Q. Now, they've asked you about the marriage between William Adam Tuttle and Rose Marie Tuttle. Rose hasn't re-married, has she?

A. No, she hasn't.

Q. How would you characterize the marriage of William Adam Tuttle and Rose Marie Tuttle? Would you characterize it as a (p. 51) normal marriage?

A. Just like any other newlyweds have a lot of problems getting adjusted to one another.

Q. And William Adam Tuttle had two children from a previous marriage, didn't he?

A. I knew of the one that he talked about. I do believe he had two.

Q. And he had a five-day old baby from the marriage to Rose at the time, is that correct?

A. Three days.

Mr. Gassaway: Three days. That's all, Your Honor.

The Court: Re-Cross?

Re-Cross Examination

By Mr. Mahoney:

Q. How far was William Adam Tuttle from Officer Rotramel when he ran by?

A. They were right there in the doorway.

Q. Was William Adam Tuttle closer to Officer Rotramel than you were when they ran by?

Mr. Gassaway: If the court, please, I'll object to that characterization as "running by." I don't believe that's the—

Mr. Mahoney: I believe those are her words, Your Honor.

(p. 52) A. No, I said, he darted out the door.

Q. All right. Excuse me.

A. We were all kind of at a triangle more or less. We were pretty much the same—

Q. When Officer Rotramel said something to William Adam Tuttle that you didn't hear, how—where was William Tuttle when Officer Rotramel said that?

A. Right to the side of me.

Q. It was before he darted out?

A. When Bill first walked up there, he asked him to wait until he finished talking to me.

Q. All right. You heard that?

A. Yes, sir. I was right there in front of him.

Q. You said later he said something, but you just—

A. That was as he was whirling out the door, and I was backing up away from the door.

Q. Okay.

A. And I could not understand what he said.

Mr. Mahoney: I see. Thank you.

Mr. Gassaway: May this witness be excused, Your Honor?

The Court: She'll be excused. Call your next witness.

Mr. Gassaway: It's past the hour of ten, so I'm going to check and see if our custodian of records is here, (p. 53) Your Honor. Your Honor, there's still not a custodian.

The Court: Call your next witness then, if you will.

Mr. Gassaway: Thank you, Your Honor. Beverly Hayes, Your Honor.

The Court: Come forward and be sworn, Ms. Hayes. Swing that microphone so you can speak directly into it if you will, please.

Beverly Jean Hayes
Direct Examination

By Mr. Gassaway:

Q. Will you state your full name for the court and record, please ma'am?

A. Beverly Jean Hayes.

Q. Where do you live, ma'am?

A. 7601 Northwest Sixth, Apartment 168.

Q. Are you a married woman?

A. Yes.

Q. And may I ask you how old you are?

A. 36.

Q. And do you—are you employed at the present?

A. Yes.

Q. And where are you employed?

A. The name's been changed. It's the Blue Fox. It was the Will Do Club.

(p. 54) Q. Okay. But you now work at what they call the Blue Fox Club?

A. Yes.

Q. Is that located at Northwest Tenth and Portland?

A. Yes.

Q. And what is your job? What do you do there?

A. I'm manager.

Q. Did you have occasion to be at the Will Do Club at the corner of Northwest Tenth and Portland on the 4th day of October, 1980?

A. Yes.

Q. And what time did you arrive there if you recall?

A. Seven o'clock.

Q. And did you see William Adam Tuttle there when you arrived?

A. Yes.

Q. Did you know William Adam Tuttle?

A. Yes.

Q. How long had you known him at that time?

A. Approximately a year.

Q. Did you know him socially or just from up there at the Club, or how did you know him?

A. I met him up there, but he had meals at my house, him and his wife, and it was, we went other places, it wasn't just there.

Q. Okay. What type of man was William Adam Tuttle?

A. Very easy-going, quiet.

Q. Had you ever known him to carry a weapon?

(p. 55) A. No.

Q. Had you ever known him to own a gun?

A. No.

Q. Had you ever known him to be in any type of fight?

A. No.

Q. Around eight o'clock that night, October 4, 1980, were you still in the club?

A. Yes.

Q. Did you observe a police officer come in that club?

A. Yes.

Q. Will you tell the jury what you observed happening when this officer came into the club?

A. One police officer came in.

Q. Okay. Tell the jury what happened.

A. He come in, and he motioned for Vonnie, who was the bartender at the time, to come down and talk to him. He said he had a report of a robbery or some kind of problem in there.

Q. Did you hear that?

A. Yes.

Q. And what—did Vonnie Hinds respond to that?

A. She said, "There's no problem here." She kind of laughed at him like, and she says, "You must have the wrong place."

Q. Okay. And you heard that?

A. Yes.

Q. What was William Adam Tuttle doing at that time?

(p. 56) A. He was standing next to me and he just kind of walked towards the front door, towards the police officer, and he started, and he went around the police officer, and he started out the door.

Q. And what happened?

A. The police officer asked him either to halt or wait. He needed to talk to him, but he wanted to talk to Vonnie first.

Mr. Gassaway: May I approach the witness, Your Honor?

Q. Mrs. Hayes, we've got a rough drawing up here. That's the north and south and east and west. This is supposed to be the Will Do Club, okay? And this is the basic structure of it. Did he come in the front door, the police officer?

A. Yes.

Q. And that is the west door, is that correct?

A. Yes.

Q. And I'll hand you what's been introduced as plaintiff's Exhibit 4-A. Does that show where the front door is?

A. Yes.

Q. Okay. And if you went back this way in this picture, you'd be back in the club, is that right?

A. Yes.

Q. And Ms. Hinds has marked three "X's" where she and the police officer and William Adam Tuttle were at this time? Is that basically where you remember them to be?

(p. 57) A. Yes.

Q. All right. Now, you've said that the police officer said, Halt a minute or wait a minute? Did Mr. Tuttle respond?

A. Yes, he did.

Q. Did he wait?

A. Yes. He just come right back where he was standing right, you know, very close to him, you know.

Q. Okay.

A. I mean he didn't make no moves to go the other way or nothing like that. He stood there and waited at this time.

Q. All right. Okay. Now, were they all standing there side by side?

A. Yes.

Q. Did the police officer appear to be hanging or holding on to William Adam Tuttle in any way?

A. No.

Q. Did William Adam Tuttle do anything improper to the police officer at that time?

A. No.

Q. Say anything mean to him?

A. No.

Q. Make any movements like he was going to hit him or attack him or anything?

A. No.

Q. Make any movements like he was going to get a gun out of his (p. 58) boot or anything?

A. No.

Q. Okay. What happened next? Did the police officer turn around and start talking to Vonnie Hinds again?

A. Yes.

Q. Okay. Did you hear any of that conversation?

A. No. I heard him—he was asking her if there was a problem there, and other than that, you know, I really didn't hear a whole lot.

Q. Now, did William Adam Tuttle do anything whatsoever to try to bait the officer into shooting him or grabbing him or anything there?

A. No. He wasn't, he wasn't making any motions to do anything at all out of line.

Q. Which person was the larger person, the police officer or Bill Tuttle?

A. The police officer was a whole lot larger.

Q. Can you give me an estimation of how big, how tall you think William Adam Tuttle was?

A. Probably five, seven or eight.

Q. Okay. Can you give me an estimation of about how much he weighed?

A. Between 140 and 145.

Q. Wasn't a big man?

A. No. He was, he was small.

(p. 59) Q. Could you characterize him as being slight of build?

A. Yes.

Q. And you specifically overheard Vonnie Hinds, the bartender, tell the officer there wasn't any armed robbery going on?

A. Yes.

Q. So the officer was made specifically aware of that?

A. Yes, from the very beginning.

Q. Okay. And then when the officer turned around to talk to Ms. Hinds, the bartender, what happened next?

A. Bill just kind of slowly walked around him and started out the door, and this police officer just kind of whirled around, and he propped the door open, and just laid back on his gun and just—and you could see the fire at the far end of the bar. You could see the fire from the

gun. He just propped that door open, and just put both hands on the gun, and he just laid back on it and shot him.

Q. Did you hear the police officer yell at him?

A. No.

Q. Did you—did the police officer try to run and tackle him?

A. No.

Q. Did he try to apprehend him in any way at all other than shooting him?

A. No.

Q. Okay. Had William Adam Tuttle acted suspicious in any way at this time?

(p. 60) A. No.

Mr. Gassaway: Now, may I approach the witness one more time, Your Honor? Thank you, sir.

Q. There has previously been introduced photographs of the Will Do Club, and I'll hand you what's been introduced as Plaintiff's Exhibit 4-B and ask you if that's a view of the west door here, looking down this sidewalk?

A. Yes.

(Photograph displayed to jurors)

Q. There's been previously introduced Plaintiff's Exhibit 4-C, and I'll ask you if this is a view of, standing approximately here and looking back up at the door?

A. Yes.

Q. Now, the club wasn't painted blue on October 4th, was it?

A. No.

Q. But the dimensions haven't changed any at all, or the—

A. No.

Q. And the building doesn't have any windows of any sort, does it?

A. No.

Q. And the door has a, had a spring on it on October 4, 1980, where if you opened the door it would shut back?

A. That's right.

Q. So you couldn't see in the club from the outside, could you?

A. No.

A. No.

(p. 61) Q. Okay, the view from the south looking to the north.

(Photograph displayed to jurors)

Q. I'll hand you what's been introduced as Plaintiff's Exhibit 4-B and ask you if that's the same view looking straight from the south back up to the north on the night of October 4, 1980?

A. Yes.

Q. And does it show where William Adam Tuttle was lying after he was shot?

A. Yes.

Q. And that's indicated by the blood spot?

A. Right.

(Photograph shown to jurors)

Q. And I'll show you what's previously been introduced as Plaintiff's Exhibit 4-e and ask you if this is a photo of the night of October 4, 1980, looking from about right here, looking back that direction to the east?

A. Yes.

(Photograph shown to jurors)

Q. I'll hand you what's been previously introduced as Plaintiff's Exhibit 4-F and ask you if that indicates the spot where William Adam Tuttle lay before the Amcare ambulance picked him up?

A. Yes.

Q. And does also 4-G indicate that from another slightly (p. 62) different angle?

A. Yes.

(Photographs shown to jurors)

Q. I believe you've already said this shows the west door being right here, is that correct? The people were standing approximately in this area right by the door?

A. Yes.

Q. On that night? And this is a photograph, October 4, 1980, is it not?

A. Yes.

Q. The door being right here.

(Photograph shown to jurors)

Q. Okay. Now, Mrs. Hayes, I've got the door kind of pushed out here. The door was actually level right there, is it not?

A. Yes.

Q. And when you go out the door, or for that matter in the door, does the door open in this direction?

A. Yes.

Q. All right. And the door is wider than the sidewalk, is it not?

A. Yes.

Q. Okay. So if one were to go out the door, it would swing out, and you'd have to go around the door to go to the south?

A. Yes.

Q. Okay. After he laid back on his gun and shot him, what did (p. 63) you do next?

A. I was behind the bar at this time because Vonnie had went down to talk to the police officer, and I stayed inside the bar.

Q. Okay. Now, before I go further, you've worked there for quite some time, have you not?

A. Yes.

Q. You worked there this day?

A. Yes.

Q. Would it be fair to state that the same group of people come there on a regular basis?

A. Yes.

Q. And was William Adam Tuttle one of that group?

A. Yes.

Q. Okay. And so he knew a lot of people in there, did he not?

A. Yes.

Q. All right. Now, after the shooting and you stayed in the bar, what was the next thing that occurred?

A. He motioned for Vonnie to go outside and—at this time when this incident happened, there was just one police officer and within minutes there was helicopters and all kinds of police cars that arrived, and they told us that we were going to have to go downtown.

Q. All right. And did you attempt to make a phone call at that time?

(p. 64) A. Yes.

Q. And who did you first attempt to call?

A. Charles North.

Q. And who is Charles North?

A. He owns the club.

Q. Did you make contact with him?

A. No.

Q. Why?

A. He was not at home.

Q. No one answered?

A. No one answered.

Q. Did you attempt to make another telephone call?

A. Yes.

Q. And who did you call this time?

A. The decedent's wife.

Q. Rose Marie Tuttle?

A. Yes.

Q. And did you make contact with her?

A. Yes, but no.

Q. What happened? Okay. Could you explain that?

A. I—he was telling me I was going to have to leave the club and told me that if I didn't cooperate, that they would put me under arrest and take me downtown.

Q. And did he make any physical movements to disconnect the phone?

(p. 65) A. Yes.

Q. What happened?

A. I had got Rose on the phone and I told her that there had been an accident, Bill had been shot and was outside, and this officer walked over and says, you're going to have to go outside now, and he just laid his hand on the receiver and disconnected it.

Q. Okay. Then what happened?

A. Rose had heard part of it and she called back, and I asked the police officer if I could answer the phone, and I really don't remember what he said, but I went ahead an answered it anyway, and I told Rose she needed to get

down there, because there was a problem, and I didn't know how bad it was.

Q. Then what was the next thing you did? Were you allowed to lock up the club?

A. No. I told him I had the keys to lock the club and he told me there was no need, that it was going to be roped off afterward, that I didn't have to lock it up.

Q. What happened next?

A. He forced me to get into a police car and I had to go downtown.

Q. Okay. And did anything unusual happen while you were in the police car?

A. When the ambulance arrived, all I can say is I recall seeing the nurse that was carrying a little black bag, she went over (p. 66) and they never opened the little black bag.

Q. Okay. Let me ask you this: did some months after that, did the police have occasion to come in and write you a ticket for some violations, not having paper towels and stuff like that?

A. Yes.

Mr. Mahoney: Your, Honor, I object to this as irrelevant.

The Court: Overruled.

Q. As a result of that, were you taken down to the police station?

A. Yes.

Q. And while you were there at the police station some several months later, did any police officer have occasion to say anything to you about that incident of October 4, 1980?

A. Yes.

Q. What did he say to you?

A. They just advised me it might be best that I forgot some of the incidents that happened that night.

Mr. Gassaway: That's all.

Cross-Examination

By Mr. Mahoney:

Q. Mrs. Hayes, who was that police officer you spoke with?

A. I don't know.

Q. Was he in uniform?

(p. 67) A. Yes.

Q. Did he have a name tag over his pocket?

A. I don't know. I mean, just like I told Vonnie, I don't know. I couldn't identify him if I had to.

Q. When the police officer first entered the club, where were you?

A. I was standing next to Bill.

Q. And where was that?

A. At the east end of the bar.

Q. How far were you from the front door?

The Court: Mr. Mahoney, before we complete cross-examination, let's take a 15-minute recess at this point.

Would that be agreeable? (Affirmative response). Ladies and gentlemen of the jury, we'll be recessed until a quarter of eleven, according to that clock. I want to remind you not to discuss this case or permit anyone to discuss it with you or in your presence. If they attempt to do so, report it to me upon your return. Everyone please stand until the jurors clear the courtroom. You may go ahead. Court is in recess.

(15-minute recess taken)

The Court: Be seated, gentlemen. The jurors will be here shortly.

Mr. Gassaway: May I be excused to go get the witness?

(p. 68) The Court: As a matter of fact, let me go get my courtroom deputy. Be seated, please.

Q. Mrs. Hayes, when you left, you said the police officer said that, told you to forget parts of the story, is that correct?

A. Yes.

Q. Have you spoken to the plaintiff, Rose Marie Tuttle, since that time, since October 4, 1980?

A. Have I spoken with her?

Q. Yes. About this case?

A. You mean personally with her?

Q. Yes. Has she spoken with you about the events in this case?

A. Yes.

Q. And has she pressured you on how the events of this story, the events of this incident that occurred?

A. No.

Q. Mrs. Hayes, do you remember September 16, 1981, you gave a deposition?

A. Yes.

Q. Grant Price was there? Steve Hendrickson of Mr. Gassaway's office was there?

A. Yes.

Q. Do you recall that? Do you recall giving that deposition?

A. Yes.

Q. Do you recall being put under oath to tell the truth?

A. Yes.

(p. 69) Q. In that deposition on page 5 at the bottom of the page, when the deposition started, did you make the following statement?

Mr. Gassaway: If the Court please, I will object to that as being improper use of the deposition. He can ask if that question was asked and the response to that question, the answer that was given, but I don't think the proper predicate has been laid for the statement.

The Court: All right. Go ahead, counselor.

Q. Did you make the following statement:

"I was—I was afraid of both of these people, the gentleman who got killed and this lady, his wife. Everytime I've been asked to come down here, everytime she keeps calling me at home or coming to the

bar or something like this. I feel like I'm being pressured from both sides."

Did you make that statement?

A. I don't really remember. I mean I made a statement the night that it happened. I made a statement for this deposition. I made a statement for Mr. Gassaway's office, and as I stand right now, I can't say I remember saying it, but possibly I did.

Q. Were you telling the truth in that deposition as you remember it at the time?

A. At the time, yes.

(p. 70) Q. All right. Mrs. Hayes, you were at the bar since 7 o'clock, is that correct?

A. Yes.

Q. And Bill Tuttle was standing by you, is that right?

A. Yes.

Q. Did you see what he was drinking?

A. Yes.

Q. What was he drinking?

A. I can tell what he had sitting in front of him. I didn't see him drink it. I can tell you what was sitting in front of him.

Q. What was sitting in front of him?

A. He had a shot with whiskey in it and a coke sitting there, possibly had whiskey in it.

Q. Okay. And you had seen him there since 7 o'clock?

A. He was there when I got there at 7:00.

Q. Well, you arrived at about 7:00?

A. Yes.

Q. And you stood next to him then?

A. Yes.

Q. Did he seem intoxicated to you?

A. No. He was very quiet and he had his head down towards the floor.

Q. Okay. What kind of condition was he in?

A. Very quiet.

(p. 71) Q. Was he always quiet like this?

A. He was never loud or out of line.

Q. Did he act like he did on this particular night, October 4th. Had you see him acting like that before?

A. He wasn't really acting any way. He was just standing there being quiet.

Q. Well, had you seen him acting like that before?

A. I can't say that he was acting. He was just standing there.

Q. Was he in a particular shape or condition there, different from what he normally was?

A. What kind of different shape are you saying?

Q. All right. Mr. Gassaway asked you earlier what kind of person was Bill Tuttle.

A. Very quiet, easy-going person.

Q. Okay. At the bar he had a shot of bourbon, and coke, and maybe, you don't know what was in that coke, or something, is that correct?

A. Yes.

Q. Are you a bartender at the Will Do Club?

A. Yes.

Q. Have you served that drink to Bill Tuttle before?

A. Yes.

Q. Okay. What does he usually drink?

A. Either bourbon and coke or beer.

Q. Does he drink shots of bourbon and coke or something that (p. 71) often?

A. If he drinks whiskey, that's what he drinks.

Q. Okay. And you don't know that Bill Tuttle was acting any different that night than he does normally, is that correct?

A. I don't know what you mean by normal.

Q. You know Bill Tuttle, don't you?

A. Yes.

Q. Or you knew him?

A. Yes.

Q. How long have you known him?

A. Approximately a year at the time.

Q. Were you friends with Bill Tuttle?

A. Yes.

Q. Were you on a first-name basis?

A. Yes.

Q. Were you familiar with how he acted?

A. Yes.

Q. Okay. Was he acting different on October 4th than he usually acted?

Mr. Gassaway: If the Court please, it's repetitious. She's already answered that the best of her ability.

The Court: Overruled. I'll let her answer if she can.

A. He acted like he might be upset, you know, but, you know, he (p. 73) was just quiet, like he might have a problem he was trying to adjust to or something like this.

Q. Had you ever seen him acting like that prior to this night?

A. Possibly something similar to it in the past, one or two times.

Q. And when was that?

A. Oh, I've seen him upset.

Q. When?

A. The exact date I don't know.

Q. Do you know about what time you saw him acting like this?

A. I've seen him like this on different occasions at times when he and his wife would have disagreements, like when people get married, you know, they have a few disagreements about things.

Q. Had they had a disagreement this night?

A. I don't know. Personally I can't say because neither one of them personally told me. Someone else had told me this, so personally I can't say whether they had a disagreement or not.

Q. Okay. Now you say Bill Tuttle normally came to the club, is that right?

A. When him and his wife lived in town. They moved away for awhile. I mean whenever they were in town they came in, yes.

Q. Had Bill Tuttle been—how long had Bill Tuttle been in town prior to this event?

(p. 74) A. Probably three or four days at this time.

Q. Okay. And he come into—had he come into the Club prior to that?

A. He and Rosey had moved away.

Q. When was the last time he had come into the Club prior to the first few days of October 1980?

A. Before he got shot?

Q. Yes.

A. I don't really—I can't answer because I don't really know, you know, I don't—what exactly day or time you're trying to get me to say.

Q. You said you'd never seen Bill Tuttle carry a weapon, is that correct?

A. Yes.

Q. And did you mean all kinds of weapons? Did you ever see him with something to hurt himself or someone else with?

A. I answered Mr. Gassaway's question to no guns, no knives.

Q. How about razor blades?

A. Have I seen one in his hand?

Q. Yes.

A. No. But there was one laying on the floor one time that was handed to me.

Q. Who handed it to you?

A. Charles North.

Q. When was that?

(p. 75) A. Six to eight months prior to this.

Q. And where was that?

A. In the Club.

Q. And was Bill Tuttle in the Club that night?

A. Yes.

Q. Was he drinking that night?

A. Yes.

Q. What was he drinking?

A. He started out on beer, and then he had a—he was in there for a long period of time.

Q. And what did he drink?

A. Then he had whiskey and coke.

Q. And had he had a fight with his wife this night?

A. They were having a disagreement at the time.

Q. Did he talk with you that night?

A. He was sitting at the bar. Yes, he talked to me but I was busy, but he talked to me when I could come over and talk to him.

Q. Did he make any—did he have any strange behavior that night in front of you?

A. He acted like he was upset.

Q. And what—did he act upset that night?

A. Just acted like he had a problem and was upset, like if you, most married couples have a few problems, and he acted like he wanted to go home, you know.

(p. 76) Q. Was this similar to the way he was acting on October 4, 1980?

A. Yes.

Q. And what did Bill Tuttle do on that night six months before—

Mr. Gassaway: If the Court please, we'll object to that and I ask to approach the bench.

(The following conference was had at the bench out of the hearing of the jury:)

Mr. Gassaway: If it please the Court, for the same reasons set out in our motion in limine and brief in support thereof, we'd object to all this evidence as being incompetent, irrelevant, and immaterial, and the prejudice would outweigh the probative value of any testimony.

The Court: What question or answer did you expect to elicit?

Mr. Mahoney: He cut his wrist with a razor blade, that he knew what he was doing, and his mental state, he wanted to cut himself.

The Court: Objection will be overruled.

Mr. Hughes: This is months before, months before. This is months before and just for the sake of saving time, Judge, may we have a continuing objection to this inquiry throughout the remainder of the trial?

The Court: Sure.

(The following proceedings were had within (p. 77) the hearing of the jury:)

Q. Mrs. Hayes, on that night at about six months before October 4 in the Will Do Club, what did you see William Adam Tuttle do?

A. I personally didn't see him do anything. Charles North—

Mr. Gassaway: If the Court please, I'll object to anything somebody else might have seen to be hearsay.

The Court: Only testify to what you have seen.

A. I know nothing personally of anything that happened. I know an incident happened. I didn't—I wasn't right there at the time it happened.

Q. You weren't there when it happened?

A. I wasn't in front of him when it happened. I was behind the bar, but I was just—

Q. Did he say anything to you that night?

A. Yes.

Q. What did he say to you?

A. At what period of time this night? I told you awhile and, I talked to him off and on all night long.

Q. All right. Did William Adam Tuttle cut his wrist in front of you?

Mr. Gassaway: If the Court please, she's already testified she had no personal knowledge of that, Your Honor.

The Court: Sustain the objection. Just ask the (p. 78) witness to describe what, if anything, she saw, Counselor.

Mr. Mahoney: Your Honor, I'd like to refer to a deposition, the same deposition I referred to earlier on September 16 in regard to her response to that question.

The Court: Ask her first what she saw and observed.

Q. Mrs. Hayes, what did you see that night?

A. I seen—well, I was—the owner of the Club was standing next to Bill, and he noticed that there was a puddle of blood on the floor and—

Mr. Gassaway: If the Court please, I would object to that and move it be stricken as something someone else saw, that would be—

A. And he—

The Court: Sustained. Just testify as to what you saw and what you observed.

A. I saw Bill's wrist cut, but I mean it was bleeding. I didn't see him cut it. It was bleeding.

Q. Did he say anything to you just prior to your seeing his wrist being cut?

A. He said that Harry, my husband and I, we'd—he said we'd always be [illegible]nds, and to tell Vicky that he—I don't remember exactly now he said it—he'd always care for her or something like this.

Q. And then that was just prior to his wrist being cut?

(p. 79) A. Probably, Oh, I'd say from within five minutes. It was just prior to it, yes.

Q. Okay. Did he seem distraught at the time?

A. Did he seem what?

Q. Did he seem emotionally upset?

A. He was just quiet.

Q. Was his voice in a level tone when he told you he thought a lot of you?

A. Yes, he was, like I was being complimented.

Q. And he wasn't acting unusually excited or—

A. He never got excited and showed emotion. I mean he didn't get loud at all.

Q. Okay. After you saw the pool of blood, did he attempt to help himself?

A. I didn't see. I was behind the bar.

Q. Did Charles North call your attention to the pool of blood on the floor?

A. Yes.

Q. Did you know where that pool of blood was coming from?

A. Yes, because I seen his wrist bleeding.

Q. Okay. Did he try to stop the bleeding?

A. Did Charles?

Q. Did William Adam Tuttle try to stop the bleeding?

A. No. Charles was, Charles told him that he thought he was just trying to get Rosie's attention and that they were (p. 80) having a disagreement, and he just asked him to leave, because—and so he went out the door, and my husband followed him down the street, and got one of these bar towels to tie his arm up, and Charles told me to call the police. In this kind of an incident, he wanted the police called. And he—

Q. Did the police come that night?

A. Yes. Charles had me put this razor blade that was down on the floor behind the bar, and later on an ambulance come, and later they arrested him for public drunk.

Q. Okay. Mrs. Hayes, let's go back to October 4th, 1980, when Officer Rotramel entered the club, how far were you from the door?

A. I was next to Bill at the east end, east end of the bar.

Q. Do you know about how many feet that is?

A. Probably about half as long as right in front of the—

Q. Jury?

A. —jury.

Q. Okay. And is it your testimony you could hear the conversation between Ms. Hinds and William Adam Tuttle and Officer Rotramel?

A. Between the three of them?

Q. Yes. Could you hear what was being said?

A. Yes, he never—he really didn't talk to Bill other than tell him to come back in, he needed to talk to him.

(p. 81) Q. Okay. And do you remember the words that Officer Rotramel used when he spoke to William Adam Tuttle?

A. He, first time when Bill started out the door, he either said halt or wait a minute.

Q. He said, "Halt"?

A. Not loud. He just said either halt or wait a minute, I need to speak to you.

Q. Loud enough that you could hear him saying it from halfway from the jury box to where you are?

A. At about the time as far as we are right now.

Q. And you could hear it?

A. Yes.

Q. William Adam Tuttle was much closer to him than you were, correct?

A. Yes, and he responded. He come back in and stood beside the police officer.

Q. Okay. Did you hear any other conversation between them?

A. Between him and the police officer?

Q. Yes.

A. No. He went back to talk to Vonnie and he said, I need, when I finish talking to Vonnie, I need to talk to you.

Q. So he told that to Bill Tuttle?

A. Yes.

Q. And Bill Tuttle went out the door after Officer Rotramel told him that?

(p. 82) A. He walked around him and went out the door, yes.

Q. Went out the door? Did Officer Rotramel say anything to William Adam Tuttle after he went out the door?

A. Not the second time.

Q. Okay. And when Officer Rotramel was holding the door open, could you see where William Adam Tuttle was?

A. No. All I seen was the fire from the gun and propping the door open.

Q. Did you see which way William Adam Tuttle left the building?

A. Yes.

Q. Which way did he go?

A. He went out the door and went south.

Q. And so that would be turning left?

A. Yes.

Q. And which way did the door open?

A. South.

Q. Goes to the left or goes to the right?

A. It goes—the door goes out towards the south.

Q. So he went out the door around the door and down south somewhere? That's all you could know, right?

A. Yes, but the front of the building is not more than about 12 feet.

Q. You couldn't see anything outside?

A. I didn't see anything outside other than the police officer propping the door open and put both hands on the gun, and (p. 83) didn't say anything. This was a strange incident because when I worked there before, there's never been one police officer come in at a time.

Q. Mrs. Hays, is there a phone in the Will Do Club?

A. Yes.

Q. And where is that located?

A. By the east, by the west door—let's see—by the west door next to the bar, I guess, is how I would describe it.

Q. Is that the same door that Rotramel and Tuttle left the club?

A. Yes.

Q. Did you see William Adam—is there any other phone in the bar?

A. No.

Q. Did you see William Adam Tuttle using that phone that night?

A. Earlier, yes.

Q. What time did you see him use the phone?

A. Probably about 15 minutes before this incident happened.

Q. Are you sure about that?

A. No. I'm not—not to the exact minute, no. But I did see him go to the phone and I asked Vonnie, I said, Who's he calling, and she said—

Q. Did you know who he was calling?

A. We just took it for granted he was calling Rose.

Q. He didn't tell you who he was calling?

A. No.

(p. 84) Q. Okay. After he used the phone, did you speak with him?

A. Yes.

Q. And was he acting normally or different after he used the phone?

A. Not any different than he had the whole evening, no.

Q. Okay. Did you inquire about his behavior?

A. I inquired about it from when I walked in. I asked him how come he didn't speak to me, and then he spoke to me.

Q. Okay. After he used the phone, did you inquire about his behavior?

A. I asked him if everything was all right.

Q. And what did he say?

A. "Yes."

Q. Did he say anything else besides "yes?"

A. Possibly. I just know he told me, yes, everything was all right.

Q. In the deposition you gave on September 16 on page 12, you were asked the question: "Did he say anything to you after the phone call?" You replied: "No, he just came back over, he came back over and he was standing beside me, and I said, 'Bill, are you all right?' and he said, 'Yes, things will be better now.'" Do you recall that?

A. Yes.

Q. Did he say that?

A. Yes. But I just figured, we all just figured he was talking (p. 85) to Rosie on the phone, because I—

Q. Mrs. Hayes, after seeing him six months before in February and seeing him this night, did you develop an opinion about his behavior that night?

Mr. Gassaway: If the Court please, I'll object to the form of that question.

The Court: Sustained.

Mr. Gassaway: Thank you.

Mr. Mahoney: Pardon me?

The Court: Sustained.

Mr. Mahoney: No more questions, Your Honor.

The Court: Redirect?

Redirect Examination

By Mr. Gassaway:

Q. This wrist slitting incident, let's get that clarified for this jury now. He didn't have both wrists slit, did he?

A. No.

Q. One, right?

A. Yes.

Q. And this was in an open bar?

A. Yes.

Q. With people all around?

A. Yes.

Q. And he just stood there?

A. Yes.

(p. 86) Q. Didn't try to conceal it?

A. No.

Q. In fact, he tried to show it to everybody, didn't he?

A. Yes.

Q. And the manager got, and the owner got mad at him, didn't he?

A. Yes.

Q. You weren't concerned about him bleeding to death, were you?

A. No.

Q. Because he wasn't going to, was he?

A. No.

Mr. Mahoney: Objection, Your Honor. She's not qualified to answer that.

The Court: Sustained.

Q. And he got run out of the club?

A. Yes.

Q. And did the owner call the police because he was mad about it?

A. He had to call the police. Yes, he was mad. Yes.

Q. And this man wasn't charged with attempted suicide? It was a crime. You said he was arrested for public drunk, is that right?

A. Yes.

Q. Okay. Now, let's clear up this innuendo about intimidation. Have I or Mr. Hughes or anyone represented intimidated you in any way whatsoever?

(p. 87) A. No.

Q. Let me ask you this about this incident where the police had you down at their own station, and they say to you they think you might be better off if you forget some of this of October 4, 1980; did you consider that intimidation?

A. Yes.

Mr. Gassaway: That's all.

The Court: Any re-cross?

Mr. Gassaway: Can I ask her one more thing from here?

Q. Have you said anything here today that you've hedged or fudged or told what was not true whatsoever?

A. No.

Mr. Gassaway: That's all.

Recross-Examination

By Mr. Mahoney:

Q. Mrs. Hayes, on that February incident, did William Adam Tuttle leave the club of his own power?

A. Yes.

Q. Were his wrists still cut when he left the club?

Mr. Gassaway: If the Court please, I would object to the form of "wrists." She's established that it was a single wrist.

The Court: Sustained. Restate your question, counselor.

(p. 88) Q. Was his wrist cut when he left the club?

A. Yes.

Q. Was it still bleeding when he left the club?

The Court: If you know.

A. I don't know, because I didn't—I mean I didn't watch him walk through the door. I can't—I wasn't watching him when he went out the door. I don't know—I mean I can't—I would say—I don't know how to answer it because I didn't see him going out the door at that time. He went out the door, you know—

Q. Okay. When did the police take you down to the station and tell you to forget your statement?

A. Oh, probably about four to six months ago.

Q. And they took you down to the police station?

A. This was prior to this, this evening when this event happened to Mr. Tuttle, one police officer come to the club.

Q. No.

A. I'm—and prior to this about 15 to 20 police officers came to the club. They demanded everyone put their hands on the bar and not to move. They arrested my husband because—they searched him, there was nothing there. He asked me to pick up his cigarette lighter. He said—he told him he was under arrest for loitering, and he had the keys to the club in his pocket, and they arrested approximately 30 people that night, and they gave me one ticket, just went in to not (p. 89) complaining about anything, or I'd get the other 30 tickets on me, and while I was down there, this conversation come up.

Q. When did you go down to the police station?

Mr. Gassaway: If the Court please, this is repetitious from direct, cross and redirect.

The Court: Overruled.

Q. What did the police have you do down at the police station?

A. What do you mean what'd they do?

Q. Did they ask you what happened in the club?

A. That evening?

Q. Yes.

A. Yes.

Q. And did you tell them what happened in the club?

A. I'd only been there 15 minutes. I come in and the bartender had had too much to drink and—

The Court: Just answer his question. Did you tell them?

A. Yes.

Mr. Mahoney: No more questions, your Honor.

Mr. Gassaway: May this witness be excused?

The Court: You'll be excused. Call your next witness.

Mr. Gassaway: Your Honor, may we approach the bench?

(The following proceedings were had at

• • •

(p. 101) allowed to dry for blood-soaked, and sent to the property room.

Mr. Gassaway: All right. And—may I approach the witness, your Honor?

Q. And I believe you did that pursuant to Section 17.05 of your Oklahoma City Police Department Manual which states that "photographs will be obtained and evidence will be preserved, when applicable." Is that correct? That's what you were doing was preserving evidence at that time, is that correct, sir?

A. Yes.

Q. And you did consider that evidence, did you not?

A. Yes, sir.

Q. And you did take that evidence to the property room as per the requirements of the policy, is that correct, sir?

A. Yes.

Q. And then you didn't have anything else to do with this case, am I correct in assuming that?

A. That's correct.

Mr. Gassaway: That's all.

Mr. Mahoney: No questions.

The Court: You may be excused. Call your next witness, Mr. Gassaway.

Mr. Gassaway: Yes, Your Honor. I would call defendant, Julian Rotramel, by deposition, excerpts of the (p. 102) deposition. I would like to read the questions and Mr. Hughes will read the answers.

The Court: Ladies and gentlemen of the jury, I want to explain that previously a deposition was taken of the defendant in this case, under oath. The plaintiff is allowed to read excerpts from that deposition, and that will be done in the form of Mr. Gassaway asking the questions. Mr. Hughes will read the answers given by the defendant, Officer Rotramel, in response to those questions.

Mr. Gassaway: Your Honor, prior to starting, would you require publishing of the deposition, or—

Mr. Hughes: You want us to announce opening and published, Your Honor?

The Court: Not unless they have an objection, it's not required.

Mr. Mahoney: Pardon me, Your Honor?

The Court: Do we need to formally publish the deposition or do you have, do you have a copy of the deposition?

Mr. Mahoney: I have a copy of the deposition.

The Court: Rick, you might get it in the meantime, if you will. Go ahead. You may proceed, gentlemen. If we run into any problem, my clerk is—

(Whereupon, the following excerpts of the deposition of Julian Rotramel were read (p. 103) into the record:)

Mr. Gassaway: "In the United States District Court for the Western District of Oklahoma, Rose Marie Tuttle, administratrix of the estate of William Adam Tuttle, deceased, Plaintiff vs. The City of Oklahoma City, a Municipal Corporation, and Officer Julian Rotramel, individually and as an employee of the City of Oklahoma City, and the Oklahoma City Police Department, Defendants, Case Number, Civil 81-679-W. Deposition of Julian Rotramel taken on behalf of the Plaintiff on March 24, 1982, in Oklahoma City, Oklahoma, before Elizabeth Omeilia, CSR, CP, and Notary Public for the State of Oklahoma. Appearances for the Plaintiff, Michael Gassaway, Attorney at Law, 1501 Classen Boulevard, Suite 200, for the Defendant, Richard Mahoney, Attorney at Law, 309 Municipal Building, Oklahoma City, Oklahoma.

Julian Rotramel

Being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Gassaway:

Q. Would you state your full name, please, sir?

A. Julian Rotramel.

Q. Would you spell that for the reporter, please, sir?

A. J-U-L-I-A-N R-O-T-R-A-M-E-L.

(p. 104) Q. Where do you reside, sir?

A. 7901 South Council.

Q. When were you accepted for employment to the Oklahoma City Police Department?

A. I am not sure of the exact date.

Q. Can you give me a month and a year?

A. July of '79.

Q. How were you notified that you were accepted as a candidate for the Oklahoma City Police Department?

A. I believe following the oral interview, they told me in person.

Q. When did you begin your employment?

A. August 3, '79.

Q. Tell me what you did in the first few months as an employee of the City of Oklahoma City for the Police Department.

A. I went to the Police Training Academy.

Q. That is the very first thing you did?

A. Yes.

Q. Where was it located?

A. On North Portland.

Q. When did you begin attending the Academy?

A. August 3.

Q. On the day you were actually employed?

A. Yes.

Q. And do you remember how many other candidates were attending?

(p. 105) A. Approximately 34.

Q. How long did you attend the Academy?

A. I graduated in December.

Q. Four months?

A. I believe so.

Mr. Mahoney: Your Honor, may I ask a question?

The Court: Sure.

(The following conference was had at the bench out of the hearing of the jury:)

Mr. Mahoney: Mr. Rotramel is present. They can read the deposition if he is unavailable or—

The Court: No, they can call—with a party litigant, they can read excerpts from his deposition and use it even though he's present. The rule especially provides for that.

Mr. Gassaway: 32 and 801.

(The following proceedings were had within the hearing of the jury:)

Mr. Gassaway: We're going to pick back up at Page 11, Line 12:

"Q. Did you have any specific training about responding to calls of armed robbery in progress?

A. I don't recall the specifics of it.

G. Do you recall how many hours of training you received, classroom hours?

(p. 106) A. Are we speaking in specific response to an armed robbery?

Q. Yes, sir.

A. No, sir.

Q. Could you even estimate? Did you receive more than one hour of training?

A. I believe so.

Q. Did you receive more than 10 hours of training?

A. I don't think so.

Q. So now we've got it narrowed down between one hour and ten hours. Can I narrow it closer from one hour to five hours of training?

A. Not by me.

Q. You are only comfortable with that range for that specific purpose from one hour to ten hours?

A. To the best of my recollection.

Q. And that's the Academy you attended upon your employment with the Oklahoma City Police Department?

A. Yes, it is.

Q. And this is where you got the training before you were turned out on the street?

A. Yes.

Q. Did you receive any other training other than this Academy before you were turned loose?

A. Before I went to the streets?

(p. 107) Q. Yes.

A. No.

Q. Were you ever taught that there was any difference in how to respond to an armed robbery in progress if you were patrolling by yourself as opposed to patrolling with a partner?

A. I don't recall that.

Q. So to the best of your recollection at this time, the answer is "No?"

A. Yes.

Q. Do you recall anyone training you as to any differences to approach a call of armed robbery in progress when you are riding by yourself or riding with a partner?

A. I don't recall that.

Q. Did you ever receive any training from your employer, the City of Oklahoma City, on how to enter a closed building that you can't see in if you have an armed robbery in progress call there?

A. Not for the call specifically armed robbery in progress.

Q. Did you receive any training in this course or for that matter, any of the other courses, of whether or not to wait for a backup if you were by yourself and you had an armed robbery in progress call, and you arrive at the scene, and you can't see in the building, and the door was shut, and you're the only one there?

(p. 108) A. I don't recall.

Q. So your answer is to the best of your recollection, you received no training?

A. To the best of my recollection.

Q. Did your employer give you any specific training on how to secure a situation or how to enter such a building if you have to enter it by yourself. In other words, to enter the front door, the back, or some other entrance priority wise would you go in first?

A. For this particular call?

Q. An armed robbery in progress?

A. No.

Q. How long had you been working out of school as a police officer on the 4th day of October, 1980, approximately?

A. Approximately 10 months.

Q. What job descriptions did you hold during those ten months?

A. Patrol officer.

Q. What are the duties of a patrol officer?

A. Answer radio calls and patrol your district.

Q. Did you ever work with a partner?

A. Yes, I did.

Q. In your training in your academy, did they give you a copy of the Oklahoma City Police Department Operations Manual?

A. Yes, they did.

Q. Were you told to read it and study it?

(p. 109) A. Yes.

Q. And the manual said—.

Mr. Gassaway: May I quote the particular page, Your Honor?

(The Court indicated affirmatively.)

"and the manual said, 'under all circumstances, bearing in mind the value of human life, an officer will exercise the utmost discretion in the use of his weapon.'" Is that correct?

A. Is that a copy?

Q. I don't have a copy of the entire manual here, no, but do you recall that being accurate?

A. I don't recall that specific statement.

Q. Based upon your experience, would you consider that a fair statement?

A. A fair statement?

Q. Yes.

A. Of the manual?

Q. A correct statement of the use of a weapon that you should exercise the utmost discretion in the use of your weapon?

A. I believe so.

Q. Should a police officer to the best of his ability try to make an arrest or an apprehension without violence?

A. Yes.

Q. Based upon your experience?

(p. 110) A. Yes.

Q. Would the use of a firearm by an officer be justified if an apprehension or arrest can reasonably be made without violence?

A. No.

Q. It's not justified, is it?

A. No.

Q. Is the use of a firearm justified to fire a warning shot?

A. No.

Q. Is the use of a firearm justified to apprehend a misdemeanor suspect or a person who has committed a misdemeanor in your presence?

A. I can't think of any circumstances.

Q. So your answer is no?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Is the use of a firearm justified when the use of deadly force constitutes a greater threat to human lives than allowing a criminal to escape?

A. Yes.

Q. It's not justified, is it?

A. No.

Q. Northwest Tenth and Portland is a pretty busy intersection. Would that be a fair statement?

(p. 111) A. Pretty busy.

Q. Would you consider the use of a firearm a last resort of any fleeing suspect?

A. Yes.

Q. You can't shoot a man that's running from you if you have not seen an offensive weapon, can you?

A. No.

Q. An offensive weapon could be a gun, a knife, or perhaps a multitude of other things that can cause great bodily injury or death, is that correct?

A. Yes.

Q. Did you see an offensive weapon in the attempted apprehension of William Adam Tuttle on the 4th day of October, 1980, at a location at approximately Northwest Tenth and Portland outside the Will Do Club?

A. No.

Q. And you shot William Adam Tuttle that night, didn't you?

A. Yes, I did.

Q. In your capacity as a police officer?

A. Yes.

Q. Okay. I guess we ought to start from the first then. What were you doing on the night of October 4,

1980, when you received a call of an armed robbery in progress at the Will Do Club?

A. I was on patrol.

(p. 112) Q. By yourself?

A. Yes, I was.

Q. What did the dispatcher tell you if you recall?

A. "Armed robbery in progress, Northwest Tenth and Portland, the Will Do Club, suspect, white male, brown hair, and glasses."

Q. Any physical description of size?

A. I don't recall it now.

Q. So to the best of your recollection, there was not a physical description as to size?

A. To the best of my recollection now.

Q. And your report, your report doesn't indicate any physical dimensions of any sort, does it?

A. No, it doesn't.

Q. Did you at that time make any investigation as to any alternative entrances or exits of the building?

A. No, I did not.

Q. Was there any reason why you didn't?

A. None.

Q. Were there any windows that you could see in?

A. None that I could see, no.

Q. When you got there, did you park your vehicle directly in front of the west door?

A. Yes."

Mr. Gassaway: May I approach the witness, Your Honor?

"Q. The west door. So there was no other vehicle impeding your ability to park in front of the door?

A. No.

Q. Were there any other cars in the parking lot?

A. I believe there were.

Q. Can you give me your best estimate as to the number of cars?

A. One or two.

Q. So it did not appear to be crowded?

A. No.

Q. Did you call for a backup before you went in?

A. No.

Q. Didn't think about waiting for a backup before you went in? Were you trained to wait for a backup before you went in?

A. Not specifically.

Q. Well, you didn't have any specific training on when to wait for a backup and what not to do, did you?

A. No specific training, no.

Q. Well, they could have given you some courses on handling this specific situation, could they not, entering a blind building?

A. Yeah.

Q. You didn't have any training in that, did you?

A. I don't recall it now.

Q. And you have already said you didn't have any training on when to wait for a backup and when to proceed in a blind building with an armed robbery in progress, didn't you?

A. I believe that's right.

Q. And they could have given you that training, couldn't they?

A. They could have.

Q. And you didn't receive it, did you?

A. To the best of my recollection, no.

Q. Based on those two statements now, can you tell me under oath that you were adequately trained to handle that specific situation?

A. No.

Q. They didn't train you to look for a back door, did they, so as to be able to slip in without being easily noticed?

A. I don't recall that.

Q. In any event you went in without your gun drawn?

A. That's true.

Q. You didn't see any weapons?

A. No.

Q What did you do next?

A. As soon as I came in the door, I stopped the first person that came towards me.

(p. 115) Q. Did that happen to be the victim in this case?

A. Yes, it did.

Q. You didn't advise him that he was under arrest or anything?

A. No, I did not."

Mr. Gassaway: May I approach the witness again, Your Honor?

The Court: Yes.

"Q. Item No. 1 (pointing to exhibit). Did you smell any alcohol on this suspect?

A. No.

Q. And this suspect turned out to be William Adam Tuttle, is that correct?

A. That's correct.

Q. So you did not detect the odor of alcohol?

A. I did not.

Q. Did he talk to you?

A. He said one statement, one word.

Q. What was that?

A. "Why."

Q. Did you give him a reason?

A. I said, "I have a call. Stay inside."

Q. Other than saying, "I have a call, stay inside," you gave him no other reason?

A. That was it.

(p. 116) Q. Did he have a drink in his hand?

A. When I first came in, yes.

Q. Did you observe any armed robbery in progress at that point?

A. No, I did not.

Q. Did he go out the west door?

A. Same door I came in.

Q. That's the west door. You hadn't seen any weapon on this man, had you?

A. No, I hadn't.

Q. Did there appear to be anybody scared at the time, the bartender or the customers?

A. No.

Q. Did there appear to be anything unusual going on inside?

A. No.

Q. And this man you said you observed had a drink when you came in?

A. Yes.

Q. Would it strike you as unusual that an armed robber would be standing there with a drink? More than likely if he were an armed robber, he would be standing there either with the fruits of the robbery or with an of-

fensive weapon, armed and dangerous and trying to rob somebody. Isn't that correct?

A. That's true.

Q. And you wouldn't consider a drink an offensive weapon, would you?

(p. 117) A. No.

Q. He hadn't acted like any kind of tough guy inside the bar, had he?

A. No.

Q. Where did you first observe him when you looked outside?

A. At the south end of the building."

Mr. Gassaway: May I approach the witness, Your Honor?

The Court: Surely.

"Q. West door south end of the building. Did you hide behind your car or did you have anything to protect your body?

A. Nothing.

Q. Were you standing out in the open on the sidewalk?

A. Yes.

Q. With your gun pulled?

A. Yes.

Q. Pointed at the man?

A. Yes.

Q. Two hands or one hand?

A. I believe two.

Q. But you drew down on him with your weapon?

A. As I cleared the door, yes.

Q. 357?

A. Yes.

(p. 118) Q. What did he appear to be doing, running?

A. He was crouched down.

Q. Crouched down behind what?

A. Behind nothing.

Q. He was out in the open?

A. True.

Q. Was he crouched down such as one would squat like a catcher?

A. I don't recall.

Q. Was he crouched down like he was bending over to touch his toes?

A. I don't recall the particulars.

Q. Was he facing you or was he facing away from you?

A. He was facing away from me.

Q. How high were you holding your weapon?

A. About shoulder height.

Q. Right where your arms come straight out, would that be a fair statement?

A. Fair.

Q. Were you watching for a weapon?

A. I was.

Q. Did you ever see a weapon?

A. I did not.

Q. What happened next? Did he come up?

A. As I hollered, he came up.

(p. 119) Q. Did he come up looking towards you or looking away from you?

A. He looked towards me.

Q. Did he turn toward you or did he just look over his shoulder?

A. He started to turn.

Q. Is that when you fired your shot?

A. That is.

Q. Can you tell me how it turns out he was shot in the back?

A. He did not complete his turn."

Mr. Gassaway: May I approach the witness, Your Honor?

Q. The bullet entry hole (indicating on picture shown to jury.) Had he committed any felonies?

A. None.

Q. Why didn't you go chase him?

A. I felt like he was the armed robber.

Q. And that was a judgment error. He wasn't, was he?

A. He had not committed a robbery.

Q. Did you attempt to run after him and tackle him?

A. No.

Q. Did you attempt to get in your car and follow him?

A. As I came out the door ?

Q. Any time?

(p. 120) A. No.

Q. Would those have been means of apprehension?

A. They could have been. Yes."

Mr. Gassaway: May I approach the witness, Your Honor?

"Q. If necessary the means would be essential as a last resort. The use of a firearm by an officer is not justified if apprehension and/or arrest can reasonably be made without violence. Did you have any courses on how to handle that situation that you were in at that time?

A. Not specifically.

Q. Do you think you could have had at that time used a course in that?

A. If the time would have permitted, yes.

Q. Perhaps they didn't quite train you well enough in that situation, did they?

A. Perhaps.

Q. Now, Mr. Tuttle didn't ever actually pull a gun on you, did he?

A. No, he did not.

Q. And he never actually made any physical threats. I'm going to kill you, you dirty cop, or anything like that?

A. No, he did not."

(p. 121) Mr. Gassaway: May I approach the witness, Your Honor?

"Q. (Pointing to exhibits) 'The officer is justified in using his firearm only in the defense of life and instances where a suspect is armed.' Did you advise him he was under arrest?

A. No.

Q. (Indicating on exhibit) 'The arresting officer's responsibility is to inform the suspect that he or she is under arrest and the nature of charges.' Did he ever make any actual, physical resistance?

A. Other than just trying to leave the bar while I held him, no.

Q. You didn't have any real grounds that this man was a fugitive from justice or anything like that, did you?

A. No.

Q. Would it be fair to say that you were acting on suspicion in attempting to apprehend him?

A. Yes.

Q. But no felony, in fact, had been committed?

A. Not in my presence.

Q. Did you have an arrest warrant for him?

A. No.

Q. And he hadn't committed a felony or a misdemeanor in your presence, had he?

(p. 122) A. He hadn't committed a felony in my presence.

Q. Well, what misdemeanor did he commit in your presence?

A. Refusal to obey a lawful command by a police officer.

Q. What was that lawful command?

A. To stay inside the club."

Mr. Gassaway: May I approach the witness, Your Honor?

"Q. (Indicating the exhibit) 'The use of firearms is not justified to apprehend a misdemeanor.' No one had pointed a finger at Tuttle and said he was the armed robber, did they?

A. No.

Q. And he died, didn't he?

A. Yes, he did.

Q. After you discharged your weapon, what was the next thing that occurred?

A. I believe that Tuttle walked on south and Officer —

Q. Lennox?

A. —Riley Lennox came running up.

Q. Were you prepared to fire another shot at this time?

A. I was. My gun was still out.

(p. 123) Q. Did you have any intent to fire another shot?

A. Until I could see his hands, I would have.

Q. Were Tuttle's pants tucked inside his boots or were they outside his boots?

A. I don't recall.

Q. Did you ever see him pull his pant leg up so he could get into his boots?

A. Not that I recall.

Q. Did the shot knock him off his feet?

A. No.

Q. In your training did they give you any type of factors to consider in whether to try to knock the man down with a bullet or just cripple him?

A. No.

Q. Did you ever think about perhaps just shooting him. Trying to shoot him in the arm or leg?

A. That night?

Q. Yes.

A. No, I did not.

Q. So perhaps you weren't as well trained by your employer as you should have been in that specific situation. Is that a fair statement?

A. Yes.

Q. And if you would have been adequately trained in that specific situation, perhaps Mr. Tuttle would be (p. 124) alive and you wouldn't have been answering these questions, is that correct?

A. That's possible.

Q. The man wasn't dead, was he?

A. No, he wasn't.

Q. He was fairly active, wasn't he, trying to get up and sit down, flopping around and yelling, after he had been shot?

A. I don't recall. I believe he was active, though, and I don't recall who searched him or what happened there.

Q. Would it be normal police procedure if one were to think that a suspect were armed and, in fact, that was the reason one had shot the suspect because he thought he was armed, to search him and disarm him or have someone search him and disarm him?

A. Probably.

Q. Absolutely."

Mr. Gassaway: May I approach this witness, Your Honor?

A. Well, I wouldn't stand around if I thought he had a chance to pull a weapon on me.

Q. (Indicating on Exhibit) 'Male officer's responsibility, thoroughly searches male suspects for weapons.'

You wouldn't let an arrestee, a suspect, sit there even if shot if you (p. 125) thought he had a weapon without taking it away from him, would you?

A. Correct.

Q. Did you search him?

A. I did not.

Q. Did Lennox secure the victim?

A. Yes.

Q. He stayed with the victim to the best of your knowledge?

A. To the best of my knowledge he stayed with him as the other officers were arriving.

Q. And you made Lennox aware that you thought he had a weapon?

A. Yes, I did. When he first walked up, I did.

Q. What other types of apprehension were available? How have you been taught to apprehend somebody running from you?

A. I could have clobbered him with my flashlight or something, anything.

Q. What did your employer teach you on how to apprehend somebody running from you? Did you have any courses in that?

A. To specifically chase down someone running?

Q. Yes.

A. Not that I recall about that specific—

Q. So you weren't given any instruction on how to apprehend a fleeing suspect?

A. Not specifically.

Q. Would that indicate to you that perhaps that portion of your (p. 126) training was inadequate?

A. Yes.

Q. Looking back on this in retrospect, if you would have had training or adequate training in all these specific areas that you and I have discussed here today, do you feel that man would have been shot that night?

A. Anything is possible.

Q. Do you think that it would have been more probable that he would not have been shot if you would have had that adequate training?

A. It's possible.

Q. So your answer is yes?

A. Yes."

Mr. Gassaway: That's all, Your Honor.

The Court: Let's take a recess at this point. Ladies and Gentlemen of the Jury—Is 1:15 agreeable with you gentlemen? (Affirmative response) We'll resume at 1:15 and I'll ask you to assemble in the Jury Assembly Room at 1:10, and I'll remind you of my previous admonition not to discuss this case. Everyone please stand. Court is in recess.

(Noon Recess Taken)

(p. 127) The Court: Be seated, please. I think we best wait for defense counsel.

Mr. Hughes: It would go smoother. Judge, we have a couple more questions that we didn't get to.

Mr. Gassaway: Now, I finished reading from the deposition. I would also like to read answers to interrogatories filed by the defendant, Rotramel. This is in the same case. It would be answers, sworn under oath. The answers to interrogatories that we filed, asking Julian Rotramel to answer under oath. They were filed December 28, 1981. They were answered February 26, 1982.

"Interrogatory No. 5. State what public offense was being committed that required the defendant Rotramel to use deadly force during the incident complained of.

Answer: Failure to obey a police officer by fleeing while said police officer was investigating an armed robbery."

In addition, interrogatories were filed asking Julian Rotramel to answer under oath certain questions. The interrogatories were filed November 6, 1981. The answer was filed February 26.

"Interrogatory No. 2. Do you allege the deceased committed any crime on the night you shot him? If so, state all crimes and when they (p. 128) occurred.

Answer: Failure to obey the command from a police officer while in the discharge of his duty."

We again point out that "use of a firearm is not justified to apprehend a misdemeanor." With that, your Honor, I would call Officer Riley Lennox through agreement, by deposition.

The Court: Do you have his deposition?

Mr. Mahoney: Your Honor, Could I have some excerpts from the Rotramel deposition read into the record at this time?

The Court: Yes, you may.

Mr. Hughes: You want me to just read the answers?

Mr. Mahoney: I'll just have —

The Court: You will just read the questions and Mr. Hughes will continue to read the answers, if that's agreeable, Counselor?

Mr. Mahoney: Page 52, Mr. Hughes. These are parts that were partially left out.

The Court: Sure. I'll explain it. Ladies and gentlemen of the jury, you will recall previously that excerpts from Officer Rotramel's deposition were read just prior to our luncheon break. Defense counsel now has the (p. 129) opportunity, if he wishes to do so, to read additional parts or excerpts which they are doing. What page and line number, Counselor?

Mr. Mahoney: Page 52, your Honor.

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Mahoney: These first parts where the Officer entered the Club were not in proper context.

Mr. Gassaway: If the Court please I'll — they said they would read excerpts.

The Court: Yes. Just read the excerpts. Why can't he just answer the question immediately preceding?

Mr. Mahoney: I'll just read other parts.

(The following excerpts were read from the deposing of the jury:)

The Court: Page and line number, if you will, Mr. Mahoney.

Mr. Mahoney: Page 51, line 25, continuing over to page 52, line 19.

The Court: Go ahead.

(The following excerpts were read from the deposition of Julian Rotramel:)

"Q. You approached the bartender, didn't you?

A. No, I stayed by the door.

Q. You motioned the bartender to come to you?

(p. 130) A. Not yet.

Q. What did you do next?

A. As soon as I came in the door, I stopped the first person that came towards me.

Q. Did that happen to be the victim in this case?

A. Yes, it did.

Q. Was the victim attempting to leave?

A. Yes, he was.

Q. How did you detain him?

A. I put my left hand on him.

Q. Now, your flashlight was in your left hand, too, was it not?

A. Yes. I put my left hand on his chest and asked him to stay in the Club.

Q. Did he obey your command?

A. He continued resisting against my hand.

Q. Was he fighting you?

A. No, just pushing, resisting."

Mr. Mahoney: Page 53, line 22, to page 54, line 1.

"Q. Did he talk to you?

A. He said one statement, one word.

Q. Which was what?

A. "Why?"

Q. Did you give him a reason?

(p. 131) A. I said, "I have a call. Stay inside."

Mr. Mahoney: Page 56, line 5, to page 57, line 2.

"Q. What did you say to the bartender?

A. Have you reported a robbery? Did you call?

Q. And she said there wasn't any robbery, didn't she?

Mr. Gassaway: We object to the leading and suggestive, if the Court please. This is his witness.

The Court: All right. Overruled.

"A. And she said, "Robbery," and I asked her — the suspect broke from my hand.

Q. So you're telling me that she did not deny that there was a robbery in progress prior to him breaking?

A. She didn't have time to say anything.

Q. And the suspect broke from you. Were you physically touching him at the time he left?

A. When I asked her the question, he broke from me.

Q. Were you physically touching him at the time?

A. I was touching him.

Q. Were you grasping him loosely or firmly?

A. I was holding my flashlight and him.

Q. Were you holding him by the arm?

A. By the shirt.

Q. By the front of the shirt where it buttons up?

A. Yeah, that's right.

Q. Did he go out the west door?

(p. 132) A. The same door I came in.

Q. What did you do?

A. I hollered immediately as soon as he broke through the door to halt.

Q. Did you holler that loudly?

A. Yes.

Q. Loud enough that others in the bar could hear it?"

Mr. Hughes: Let's see. That wasn't where he left off.

Mr. Mahoney: Excuse me.

"A. I suppose. I wasn't facing them."

Mr. Mahoney: Okay. Page 59, line 15 through 25:

"Q. At what point did you draw your weapon?

A. As I came out the door or after I cleared the door.

Q. Why?

A. The suspect, as I saw him running, or as I cleared the door, was a potential felon.

Q. Why?

A. He matched the description of the armed robber.

Q. You didn't have a physical description, did you?

A. Just what is there in the report?

Q. Brown hair and glasses?

A. Yes."

Mr. Mahoney: Page 60, line 15 through 17.

(p. 133) "Q. He hadn't made any physical threats to you at that time, had he?

A. He had made movements towards his feet where I felt that he had a concealed weapon."

Mr. Mahoney: Page 63.

Mr. Gassaway: Wait. I thought we were going to read 16 through 22. Have you changed your mind?

Mr. Mahoney: I believe I asked for 14 through 17. Am I mistaken?

The Court: I believe that's right. Go ahead.

Mr. Mahoney: I'm mistaken. Page 63, lines 18 through 20.

"Q. Where did you first observe him when you looked outside?

A. At the south end of the building."

Mr. Mahoney: Page 64, lines 1 and 2.

"Q. What did you do when you spotted him?

A. Hollered once again to, "halt!".

Mr. Mahoney: Page 86, line 6 through 16.

"Q. What other means of apprehending him were available other than shooting him?"

Mr. Hughes: 16. What was that?

Mr. Mahoney: Page 86, line 6 through 16.

Mr. Hughes: Okay.

"A. Without endangering myself outside the club?

(p. 134) Q. Just period.

A. None.

Q. There was no other way to apprehend that man other than to shoot him?

A. Outside the club, there wasn't.

Q. You either had to let him go or to shoot him?

A. Apprehension wasn't the question. I felt like I was in danger."

Mr. Mahoney: Thank you, Your Honor.

Mr. Gassaway: May I proceed, Your Honor?

The Court: Sure. Let the record reflect that I have published, opened both depositions of Officer Rotramel.

And I, also, have now the deposition of Riley Lennox. Go ahead, Mr. Gassaway.

Mr. Gassaway: Okay. At this time, Your Honor, I would like to move to introduce the applicable city ordinance, City of Oklahoma City Ordinance, Section 21-27, which deals with the interference with official process, the allegation that they said that the misdemeanor was committed.

The Court: Do you have any objection, Mr. Mahoney?

Mr. Mahoney: No objection.

The Court: Be admitted.

Mr. Gassaway: Move to admit Plaintiff's 35. May I read a portion to the jury, Your Honor?

• • •

(p. 534) Mr. Mahoney: We'll call the defendant, Julian Rotramel.

The Court: Have you been sworn, please?

A. Yes, Your Honor.

The Court: Be seated and I'll remind you you're still under the same oath as previously administered.

A. Yes, sir.

The Court: Swing that microphone further out if you need so you can speak directly into it, please.

JULIAN ROTRAMEL

Called as a witness, having first been duly sworn, testified as follows:

Direct Examination

By Mr. Mahoney:

Q. Would you state your name, please?

A. Julian Rotramel.

Q. And your occupation?

(p. 535) A. I work for an oil company, oil production.

Q. Did you ever work as a police officer with the police department?

A. Yes, I did.

Q. And when did you work for them?

A. From August 3, '79, to April of '81.

Q. All right. Were you working at the police department on October 4, 1980?

A. Yes, sir.

Q. And what were your duties at that time?

A. I was a patrol officer.

Q. All right. And were you riding by yourself or with a partner?

A. By myself.

Q. Was this in a police cruiser?

A. Yes, sir.

Q. Where were you riding?

A. The boundaries of my district were from Broadway east was the eastern boundary, and west to Portland, and from Northwest 23rd to Northwest 50th.

Q. Do you recall the events of October 4, 1980?

A. Yes, sir.

Q. Do you recall receiving an armed robbery call?

A. Yes, sir.

Q. In progress?

(p. 536) A. Yes, sir.

Q. Where were you when you received that call?

A. To the best of my recollection approximately Northwest 19th and Portland.

Q. All right. Did you respond to that call?

A. Yes.

Q. How long did it take you to respond to it?

A. Just however long it took for me to get a break in traffic and turn around, and drive back down to Tenth and Portland.

Q. Do you have sort of an estimation of how long in terms of minutes how long it was?

A. Less than two minutes.

Q. All right. What did you do when you arrived?

A. I pulled to the front or the west door of the club, and looked through the parking lot and started towards the door.

Q. Did you see anything suspicious in the parking lot?

A. No.

Q. Were there other cars parked in the lot?

A. I believe there were a few.

Q. Were there any other people outside?

A. Not that I saw.

Q. Did you enter the club?

A. Yes, sir.

Q. Did you wait for a backup before you entered the club?

A. No, sir.

(p. 537) Q. Why didn't you wait for a backup?

A. The only other car in my district was downtown. I felt like that it would be repetitious in that the call had gone out over all the channels and anyone that could help that was available was already on the way.

Q. All right. So you entered the club by yourself?

A. Yes, sir.

Q. What did you see when you entered the club?

A. Approximately 10 people just standing in the club and one man standing at the bar who immediately looked towards me and started walking towards me.

Q. All right. Did he—did you have a description?

A. Yes, sir.

Q. Do you recall the description?

A. White male, brown hair and glasses.

Q. What did the man look like who approached you?

A. He was about 5'6 or 5'7, and weighed approximately 140 or 150 pounds. He had glasses and brown hair.

Q. Did you motion for him to approach you?

A. No, sir.

Q. Did he have anything in his hand at that time?

A. No, sir.

Q. Did he have a drink in his hand?

A. Not when he started towards me.

Q. All right. Did you realize that he matched the description (p. 538) that you had?

A. Yes, sir. I did.

Q. When did you realize that?

A. As soon as he cleared the bar and started towards me.

Q. How far away was he when he started walking towards you?

A. I can't say exactly. He was half the width of the bar away from me.

Q. All right. Can you use some object in this room as how far away he was?

A. Approximately the corner of that table right there (indicating).

Q. All right. Did you stop him?

A. When he got next to me, I did.

Q. And how did you do that?

A. I reached out and took his arm and asked him to stay inside the club.

Q. And what did he say?

A. He attempted to walk on past me and I believe I said, "Stay put," and he said "Why?"

Q. All right. Did you tell him why you wanted him to stay inside?

A. I believe I said, "I've had a call. Stay inside."

Q. Did he say anything to that?

A. No, sir.

Q. Did he stay still?

(p. 539) A. Yes, sir.

Q. Did he cooperate with you when you stopped him?

A. He continued to trying to leave, but I had hold of him with my left hand by the front of his shirt by this time, and he couldn't, couldn't leave.

Q. Was he squirming or struggling?

A. Yes, sir. He was pushing back towards my hand, and then alternately pulling away from my hand.

Q. In a fast motion or slow motion?

A. Relatively slow.

Q. All right. Did you inquire of anyone about an armed robbery call?

A. Yes. I raised my voice to the barmaid and asked her to come over.

Q. And what was she doing?

A. She looked at me and walked rather quickly to the far end of the bar away from me.

Q. Okay. Now, Officer Rotramel, was that Vonnie Hinds?

A. I can't say.

Q. All right. So did you ask her what happened, if there was an armed robbery in progress?

A. Not right away. She didn't come over there.

Q. What did you say to her?

A. Pardon me?

Q. What did you say to the bartender?

(p. 540) A. Well, when she did get there, I asked if she had called an armed robbery.

Q. Did she respond to you?

A. She said, "robbery."

Q. Did she tell you that everything was fine?

A. I can't say. At that same moment the deceased broke and ran. When I asked her if there had been a robbery, he pulled from my hand.

Q. All right. While you had the decedent in your hand, did he make any movements in the club?

A. Yes, sir. After I first detained him, he immediately bent over.

Q. And what did you do?

A. I straightened him back up with my left hand.

Q. How far did he bend over?

A. Almost touching his feet.

Q. All right. Did he do that once?

A. He did it twice inside the club, the second time being when I took my hand away from him for a moment to use my flashlight to get the barmaid's attention.

Q. How were you using your flashlight to get her attention?

A. Well, I shined it on her because she wasn't—she was still standing at the far end of the bar and wouldn't come down there in response to my asking her to.

Q. When you entered the club, she walked away from you?

(p. 541) A. Yes, sir.

Q. All right. When Tuttle broke away from you, did you say anything to him?

A. Yes, sir.

Q. What did you say?

A. I said to halt.

Q. Is that the word you used, "Halt?"

A. I said, "Halt."

Q. How far away from him were you when you said that?

A. Less than four feet.

Q. All right. Did you say it in a tone of voice that you thought he could hear it?

A. Yes, sir.

Q. Which direction were you facing when you said, "Halt?"

A. I was facing—

Q. Go ahead and use the diagram if that will help you.

A. I was facing northwest. I was facing the door more or less.

Q. Did Tuttle halt?

A. No, sir, he didn't.

Q. What did he do?

A. He cleared the door and the spring shut the door back in my face.

Q. Did you follow him?

A. Yes, sir. I then pushed the door open and stepped on outside.

(p. 542) Q. Did you have your weapon out at that time?

A. I'm not sure.

Q. Do you remember when you pulled your weapon out?

A. After I cleared the door and the door shut back, and as the door shut, then I could see him, and that's when I pulled my weapon.

Q. All right. Where was he when you saw him outside the club?

A. He was on down past the—he was approximately right here (indicating on map).

Q. Where the "X" is?

A. Yes, sir.

Q. All right. What was he doing there?

A. He was in a crouched position.

Q. What did it look to you like he was doing?

A. I felt like he was, he had been inside of his boot, and that's where his hands were when I, when the door shut.

Q. Did you see his hands?

A. No, sir.

Q. Did you see what he was reaching for?

A. No, sir.

Q. Did you think that he was stumbling?

A. No, sir.

Mr. Hughes: Excuse me, Your Honor. I don't mind a little bit of leading, but—

The Court: Yes, don't lead the witness, (p. 543) counselor.

Q. All right. Did you have an opinion of what he was doing in that position?

A. Yes, sir. I felt certain that he had recovered a weapon from his boot.

Q. All right. Why did you think that, Officer Rotramel?

A. Because he had matched the description of the armed robber, and had gone for his boot twice inside the club, and had had sufficient time to recover the gun from his boot outside the club.

Q. What was the lighting like outside the club?

A. It was fairly dark.

Q. All right. Did you say anything to him when you saw him in that position?

A. Yes, sir. I once again said, "Halt."

Q. All right. What did Tuttle do when you told him to halt the second time?

A. He looked back towards me and jumped.

Q. All right. How do you mean "jumped?" Did he jump straight up?

A. Yes.

Q. What did you do?

A. That's when I fired.

Q. Did William Adam Tuttle ever turn around?

A. No, he did not.

(p. 544) Q. He had his back to you?

A. Yes.

Q. Did you say stop loud enough that he could hear you when he was in that position?

A. Yes, sir.

Q. Did you ever come in contact with this man at any time before this night?

A. No, sir.

Q. Have you come into contact with the plaintiff or anyone associated with him after that date?

A. To the best of my knowledge, no.

Q. Officer Rotramel, why did you shoot William Adam Tuttle?

A. I felt like that he had recovered a weapon and was preparing to use it on me in order to make his escape.

Q. Did you feel your life was in danger?

A. Yes sir, I did.

Q. And you shot him because your life was in danger, is that right?

Mr. Hughes: Excuse me, Your Honor. I object.

The Court: Let him testify.

Mr. Mahoney: That's all I have at this time.

The Court: Mr. Hughes.

Cross-Examination

By Mr. Hughes:

Q. You're no longer a police officer, are you Mr. Rotramel?

(p. 545) A. No, sir, I'm not.

Q. But you did — you were trained in law, is that right?

A. Yes, sir.

Q. Were you trained in terms of the law that there's a difference between suspicion and probable cause?

A. I don't recall that right now, sir.

Q. Okay. You were trained, too, in the policies and procedures of the Oklahoma City Police Department, weren't you, sir?

A. Yes, sir.

Q. And we've been through those. You've been here in court, and paragraph 9.03 and 17.05, you were trained in those, weren't you, sir?

A. Yes, sir.

Q. And you knew about them on October 4th of 1980?

A. Yes, sir.

Q. And I believe you presented yourself for deposition on the 24th day of March 1982, do you recall that?

A. I recall the deposition around that time, yes, sir.

Q. And you recall Mr. Gassaway, who sits here, was present on that day?

A. Yes, sir.

Q. And he asked you some questions?

A. Yes, sir.

Q. Mr. Mahoney, your lawyer, was present on that day, too; do you recall that?

(p. 546). A. Yes, sir.

Q. And on that day you took an oath to tell the truth?

A. Yes.

Q. And did you tell the truth to the best of your ability?

A. Yes, sir.

Q. And you heard here in this courtroom that deposition or substantial portions of that deposition read, is that right?

A. Of my deposition?

Q. Of your deposition?

A. Yes, sir.

Q. And the testimony you have in that deposition was accurate to the best of your ability, wasn't it, sir?

A. Yes, sir.

Q. And do you recall in that deposition that you were asked about specific training that you had, particularly in the investigation, preparation and investigation of armed robbery cases?

A. I believe so, yes.

Q. I'll show you, sir, what's been introduced into evidence and discussed at some length as Plaintiffs' Exhibit B, which appears to be the curriculum for the 84th Oklahoma City Police Academy. Are you familiar with that document?

A. Yes, sir.

Q. And that, sir, is the document that you were presented with, or a copy of it, that you were presented with during your (p. 547) deposition, is that right?

A. It appears to be.

Q. And you were asked at that time to circle all of the courses that you had at that Academy relating to the investigation of armed robbery, do you remember that?

A. Yes, sir.

Mr. Hughes: May I approach the witness,

Mr. Mahoney: May we approach the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Mahoney: Deposition's—I didn't bring any of this stuff in. I think this is outside the scope.

The Court: Why is this not cumulative, counselor.

Mr. Hughes: This is what he said his training was, Your Honor.

The Court: I understand that, but they haven't denied that in any way on his direct examination.

Mr. Hughes: They denied it through other witnesses, Your Honor.

The Court: In other words, you're not introducing it but to impeach other testimony?

Mr. Mahoney: It's direct —

The Court: I'll allow you some leeway, but don't spend too much time.

(p. 548) Mr. Hughes: I won't take very long.

(The following proceedings were had within the hearing of the jury:)

Q. You circled three courses that related to the investigation of armed robbery in the deposition. Do you recall that?

A. I recall circling some. I don't remember how many exactly.

Q. Well, the first I believe you'll find in the fourth week.

A. Yes.

Q. Do you find that there?

A. Yes, sir.

Q. At one o'clock, questions and answers, when to shoot/not shoot, is that right?

A. Yes, sir.

Q. And you said that in that time they showed you a film, "Shoot! Don't Shoot!", maybe more than one film, but that's what they were basically about?

A. Yes.

Q. And you remember testifying in your deposition that the part that related to the investigation of armed robbery was about five minutes?

A. No, sir. I don't recall that exactly.

Mr. Hughes: Just to refresh his recollection, Your Honor.

Q. You said five minutes, is that right, sir?

A. That's what I said.

(p. 549) Q. The next instance that you testified about where you were given training in armed robbery was the

tenth week at one o'clock on Friday, October 13th, hostage negotiations and tactical operations.

A. Yes, sir.

Q. At that time you said you saw a film, approximately five minutes of which was addressed to an armed robbery in progress; do you recall that?

A. I believe that's right.

Q. And the last course you said you had in the investigations of armed robbery in progress was in the thirteenth week, Tuesday, October 30th, at three o'clock.

A. Yes, sir.

Q. That is—it's item "E" there. There were five courses taught between three o'clock and 4:50 on that day, weren't there?

A. Yes, sir.

Q. Death and emergency messages, house welfare checks, locked out of house, wanted/stolen vehicle, and robbery scene response; is that right?

A. According to this schedule, that's what it says.

Q. That's what is typed on there, isn't it?

A. Yes, sir.

Q. And you said that that was about—20 minutes of that class was devoted to robbery investigation in your deposition, do (p. 550) you recall?

A. To the best of my recollection, yes.

Q. And those were all the courses that you said you had on robbery scene investigation; isn't that right, sir?

A. Yes, sir, going by this schedule.

Q. Yes, sir. Now, to the best of your recollection, you didn't have any training in calling for a backup, did you?

A. Could you restate that, please?

Q. You didn't have—you don't have—you didn't have any training about calling for a backup?

A. As if when to call and when not to call for one?

Q. Yes, sir.

A. I don't recall the specifics at this time.

Q. And you weren't specifically trained to wait for a backup before you went in, were you?

A. Went in?

Q. To a building such as the Will Do Club at Northwest Tenth and Portland?

A. Not specifically.

Q. And you didn't receive any training on how to enter a blind building, did you?

A. I don't recall, now.

Q. So based on the fact that you didn't receive any training in calling for a backup or entering a blind building, you can't tell us under oath that you were adequately trained to handle (p. 551) that specific situation at the Will Do Club on October 4, 1980, can you, sir?

A. The specific situation as it turned out?

Q. Yes, sir.

A. I wasn't trained for that specific situation.

Q. Well, in the deposition at least—and I'll ask you if your opinion has changed since then—

Mr. Brummitt: Your Honor, we'd object to this, again, the term "changed his—

The Court: Overruled. I'll allow him some leeway. Go ahead.

Q. You testified that you weren't as well trained by your employer as you should have been in that specific situation?

A. Is that the word I said?

Q. Yes, sir.

A. No, my opinion has not changed.

Q. And if you would have been adequately trained in that specific situation, perhaps Mr. Tuttle would be alive and you wouldn't be here answering these questions today?

A. And I said, "Anything is possible."

Q. Yes, sir.

A. That's true.

Q. And as you worked for the Oklahoma City Police Department, you actually only worked in the North Division, didn't you?

A. Yes, sir.

(p. 552) Q. You never—there are two other divisions, there's central and south, is that right?

A. That's correct.

Q. And you never worked central or south division, did you, sir?

A. No.

Q. And you know from your training and also from being in court that there was—a normal police procedure is to have a crime scene sketch done, and that there was, in fact, one done at the Will Do Club on the 4th of October 1980, don't you, sir?

A. Do I know that there was a scene sketch made?

Q. Yes, sir.

A. I believe it's been introduced.

Q. Yes. And that's normal police procedure, isn't it?

A. On a major crime scene, I believe it is.

Q. Pardon me?

A. On a major crime scene.

Q. Yes, sir. Would you—you said that you—I believe you testified that you pulled your car up adjacent to the front door; do you remember that?

A. I pulled—yes.

Q. Could you draw in here where your car was on that night?

A. This arrow (indicating) will be the front of the car.

Q. Thank you. I'll show you, sir, what's been marked and introduced as the crime scene sketch as plaintiff's Exhibit (p. 553) No. 22. Are you oriented to that, now? The numbers are on the first page.

A. Okay.

Q. That exhibit shows other vehicles present at Northwest Tenth and Portland, doesn't it, sir?

A. You mean other than the scout car itself?

Q. Yes.

A. Yes, sir. It does.

Q. As a matter of fact, this sketch doesn't show the scout car, does it?

A. No, sir. It doesn't.

Q. And it shows the vehicle—how do you spell Rotramel, R-O-T-R-A-M-E-L?

A. Yes, sir.

Q. And it shows two cars basically here and here, doesn't it?

A. Best I can tell from this, yes.

Q. And it shows another car approximately right here (indicating), is that right, sir?

A. Yes, sir.

Q. And another car here (indicating), is that right, right here?

A. Maybe a little bit further east.

Q. About right here (indicating).

A. That looks right.

Q. And another car over here (indicating), is that right?

A. That's fairly close.

(p. 554) Q. And those cars would appear to be cars that are depicted in plaintiff's Exhibits 4-D and 4-E that

were taken that night, wouldn't that, sir? Just to save a little bit of time, this picture, for example, 4-E, shows a Datsun as being this vehicle here?

A. Okay. I've identified this one. That's correct.

Q. Okay. And this one appears to be a Ford is the first vehicle, and I can't tell, that's a Nova, isn't it?

A. I can't tell.

Q. But they certainly seem to be positioned where those are, is that right, in the crime scene sketch?

A. That's correct.

Q. In addition to that, there was a street light right here that has been testified to.

A. I don't recall the light.

Q. Doesn't there appear to be one in the sketch?

A. Signal pole?

Q. Uh-huh. Light.

A. There's something there, but I can't tell what it is.

Q. Are you familiar with that intersection?

A. Fairly well, yes.

Q. Is there a street light there at that intersection or was there on the 4th of October?

A. I'm not sure.

Q. Well, you heard testimony from other officers that there was. (p. 355) You wouldn't dispute that, would you?

A. No, sir. I wouldn't.

Q. Now, at the time that you proceeded to the Will Do Club, the only information that you had was that that you got from the dispatcher, is that right?

A. That is correct.

Q. And that information was, "All officers, Northwest Tenth and Portland, the Will Do Club, an armed robbery in progress, suspect is white male, brown hair, and glasses?"

A. I don't recall now.

Q. Whatever is on the tape is what it was, is that right?

A. I believe so.

Q. And do you recall that you called in and said, "Can I have that description one more time?"

A. No, sir. I don't recall that.

Q. If it's on the tape, you wouldn't deny that, would you?

A. No, sir.

Q. And you said, and the dispatcher told you it was, "a white male, with brown hair and glasses. That's all I have on it." Do you recall that?

A. No, sir.

Q. Now, does that seem to be consistent with the information you had as you approached the Will Do Club on the 4th of October 1980?

A. Yes, sir.

(p. 556) Q. In other words, you had no more information than that, did you?

A. Not at that time.

Q. And there wasn't, at least to the best of your knowledge, any way that William Adam Tuttle could have known that Julian Rotramel would be responding to that call on that evening, is there, sir?

A. That I specifically would respond?

Q. Yes, sir.

A. That's correct.

Q. And there was no way—and you at the time you walked in that door of the Will Do Club to the best of your knowledge, had never had any contact with William Adam Tuttle in your life, had you, sir?

A. That is correct.

Q. And there is no way that William Adam Tuttle baited you into believing that there was an armed robbery in progress, that William Adam Tuttle knew that Officer Rotramel would be coming to this bar on Tenth Street?

A. That he baited me, specifically?

Q. Yes, sir.

A. And not a police officer.

Q. Baited Officer Rotramel?

A. He did not know that I specifically would be there.

Q. So if this jury had been told that, it would not be true, is (p. 557) that right?

A. I'm not sure I understand you.

Q. That's all right. Now, as I understood your testimony, you then parked in front of the door where you described, is that right?

A. Yes, sir.

Q. And you left your spotlight on on your car?

A. I believe that's right.

Q. And then you went in the door?

A. Yes.

Q. And you obviously then weren't too close to Mr. Tuttle when you, when you first came in, were you?

A. When I first came in, no.

Q. And when you go inside at the Will Do Club, it's a little crowded there right inside the door, isn't it, sir?

A. You mean people?

Q. There's just not much room to maneuver there?

A. I don't recall that.

Q. Let me show you the front page of the crime scene sketch, which would appear to be an interior drawing at the Will Do Club, and also to refresh your recollection, I'll show you plaintiffs' Exhibit 4-A, which appears to be a shot looking this way at the club. You see that?

A. I still don't see—

Q. Here's the door. The bar is this way.

(p. 558) A. Okay.

Q. In other words, if it were on the picture, it would be just like that.

A. Yes, sir.

Q. And the crime scene sketch and the photograph show that there's a wall approximately right here; isn't that right, that runs down behind the bar?

A. It looks that way.

Q. And that's what it looks like here, too, in the picture; isn't it, sir?

A. You're speaking of this wall back here?

Q. Yes, sir, where there's a door.

A. Yes.

Q. And in addition to that, there is a bar right here. A railing would be a more appropriate description, is that right?

A. That's correct.

Q. And then in front or down that railing is where the bar itself goes, is that right?

A. Yes.

Q. And the sketch shows that the distance from here to here (indicating), in other words from the wall to that bar is 3'6", is that right?

A. Yes.

Q. The diagram also shows and the picture shows that there's a (p. 559) cigarette machine right beside this door, isn't that right?

A. That's correct.

Q. And this rail appears right here (indicating) at least in the picture appears to be rounded at the top, doesn't it, sir?

A. Yes.

Q. Is that the way you essentially remember it that night?

A. I'm real fuzzy on the interior of the Club, but I'll agree with that.

Q. You were, of course, familiar with the policy on firearms at the Oklahoma City Police Department, weren't you, sir?

A. Yes, sir.

Q. And you were trained in it, is that right?

A. In the policy?

Q. Yes, sir.

A. Yes, sir.

Q. You were trained in the fact and you knew when you went in there that you were to use the utmost discretion in the use of a firearm?

A. Yes.

Q. And you were acquainted with the times when you were and were not allowed to use firearms?

A. Yes.

Q. And you'd also had courses on civil rights?

A. That's true.

(p. 560) Q. And you knew what people's civil rights were, didn't you?

A. Yes.

Q. And as part of your work with the Oklahoma City Police Department and pursuant to the regulations, you were required to prepare a detailed, written report of this incident, is that right?

A. I believe that's right.

Q. And in addition to that, you had talked with officer, Sergeant, or Detective Chambers on that night in question, is that right?

A. I believe that's right.

Q. And do you recall that he told you not to worry, but just to make your report, tell the truth, and refer every detail you could remember into the report?

A. Yes.

Q. And he told you that on the 4th of October 1980, didn't he?

A. Yes, sir.

Q. Prior to the time that you made the report?

A. I believe that's correct.

Q. And you did, in fact, make a detailed, written report?

A. Yes.

Q. And you said that you parked your car facing east, you shut it off, you left the spotlight on the door of the Club, and put your hand-held radio in your back pocket. Do you remember that in your report?

(p. 561) A. Yes, sir.

Q. You said you had your flashlight in your left hand, and you opened the door with your left hand. Is that right?

A. Are you reading from the report?

Q. Yes, sir.

A. Because I don't remember specifically now. (Whereupon witness looked at report.) That's correct.

Q. Are you satisfied that that's what's in your report?

A. Yes, sir.

Q. Incidentally, you had approximately 30 hours of report writing there at the Police Academy, didn't you?

A. That's correct.

Q. Once you entered the place, or prior to entering the bar there, you made no investigation as to alternative entrances or exits, did you, sir?

A. No, sir.

Q. You made no call for a backup?

A. No, sir.

Q. And you didn't have your gun drawn?

A. No, sir.

Q. That's correct, isn't it?

A. That is correct.

Q. You went inside and you tried to look at all the people in there, is that right? That's what you put in your report.

A. That's correct.

(p. 562) Q. And the suspect started — you said in your report — "The suspect started walking toward me while I stood inside the doorway." Do you remember that?

A. Yes, sir.

Q. You didn't see any weapons, did you?

A. Not at that time.

Q. As a matter of fact, you never saw any weapons, did you?

A. No, sir.

Q. And when you went inside, it didn't appear to you that anyone was scared in there, did it?

A. I really didn't have time to gauge everyone's condition at the moment.

Q. Do you recall in your deposition, page 61, line 7 through 9, this question being asked and this answer being given:

"Question: Did there appear to be anybody scared at the time, you know, the bartender or the customers?

Answer: No."

Do you recall that question being asked and that answer being given?

A. Yes, sir. I believe that's correct.

Q. There also did not appear to be anything unusual going on inside the bar as you entered, isn't that right, sir?

A. That's correct.

Q. And no time in the bar was Mr. Tuttle acting like any kind of (p. 563) a tough guy or threatening you or anything, was he, sir?

A. No. He did not.

Q. He made no physical threats to you, did he, sir?

A. He didn't say anything.

Q. He didn't fight, he didn't knock your hand away, and you didn't advise him he was under arrest; isn't that right?

A. No. He did resist me trying to keep him inside the bar.

Q. But you say he pushed against your hand with his chest?

A. And he also tried to pull away, also.

Q. Pardon?

A. He also tried to pull away from my hand.

Q. Okay. And he started walking toward you while you stood inside the door, and then you said in your report, he walked around you and started out the door. Do you recall saying that?

A. Yes.

Q. And at this point, your testimony is very similar to the testimony of the eyewitnesses inside there, isn't that right?

A. From what I've heard, yes.

Q. And you said that you put your — in your report — you put your left hand on him and stopped him from leaving the Club. Do you remember that?

A. Yes, sir.

Q. You also had your flashlight in that hand?

A. That's true.

(p. 564) Q. Incidentally, how tall are you, sir?

A. Six foot.

Q. How tall were you at the time?

A. Six foot.

Q. You put your hand against his chest and you said you could feel him pushing against your hand with his body; do you remember that?

A. Yes, sir.

Q. And you said he matched the description of the armed robber, right?

A. That's correct.

Q. Then you said in your report that you tried to keep an eye on him, and then you corrected your report to say that you were careful to keep an eye on him as you tried to get the attention of the bartender; do you remember that?

A. I don't remember the exact wording. (Whereupon, witness was shown report.) That's correct.

Q. So you said in your report that you tried to keep an eye on him, and you corrected that to say, you were careful to keep an eye on him; is that right?

A. That's correct.

Q. And you say you told him to stay inside the Club for a minute, is that right?

A. Yes, sir.

Q. And "Tuttle continued facing you, but stared at the ground" (p. 565) is what you put in your report?

A. That's correct.

Q. Then you say you took your left hand away from him, and shined a light at the bartender?

A. Is that the next, very next thing that happened?

Q. You said to stay in here for a minute, I believe. You told him to stay inside the Club for a minute, right?

A. Right.

Q. Okay. At this point and time when he's come up to you, and you stopped him, and you're holding the flashlight, and you're holding him — you were holding him by the shirt, weren't you?

A. Yes, sir.

Q. At this point and time where are you standing and where is he standing?

A. I would be right here (indicating), and he would be right next to the door.

Q. You would be here (indicating)?

A. No. That would be him right next to the door.

Q. Just draw on there where you would be.

A. Okay. And this would be me (indicating).

Q. And according to your testimony, where was the barmaid at that time?

A. Okay. He's just walked up to me? Is that where we're at?

Q. Where you're holding him with his flashlight, your flashlight (p. 566) and his shirt?

A. She would be at this end of the bar (indicating).

Q. And where would Beverly be, Beverly Hayes?

A. I can't differentiate in my mind now.

Q. Which one was which?

A. That's true.

Q. Which way are you facing?

A. This would be my back right here (indicating).

Q. So you're generally facing out towards the north end of the Club?

A. Yes, sir.

Q. And which way is Mr. Tuttle facing?

A. Northeast.

Q. Then at that point, it's your testimony, isn't that where you said, "I had a call, stay in here for a minnute," and then you took your left hand away from him, and shined your light at the barmaid?

A. Yes, sir.

Q. At that time you didn't smell any alcohol on him, did you, on Mr. Tuttle?

A. No, sir.

Q. As a matter of fact, you never did, did you?

A. No.

Q. And at that time, you were not working an armed robbery in progress, were you, sir?

(p. 567) A. I wasn't certain.

Q. But you did not, did you, sir? Pardon me?

A. I did not observe an armed robbery?

Q. Well, let me ask you this question, if you recall this question being asked and this answer being given, page 55, line 18, of your deposition:

"Question: Did you observe any armed robbery in progress at that point?

Answer: No. I did not."

Do you recall that question being asked and that answer given?

A. I believe that's correct.

Q. That was accurate, wasn't it?

A. Yes, sir.

Q. You said you shined the light on the barmaid, is that right?

A. Yes.

Q. And when you looked back, the suspect, according to your report, "bent down suddenly for his feet, possibly his left boot." Do you remember that?

A. Yes, sir.

Q. That you grabbed him with your left hand, "best I could, and pushed back against the door." He pushed back against the door, and you told him to be sti!l, do you remember that?

A. Yes.

Q. Now, at this point after you say he reached down towards the (p. 568) boot, are you still standing in the same position?

A. Yes.

Q. Are you still holding onto him?

A. Yes.

Q. So you took your hand away from him, and then put your hand back on him; is that right?

A. For a moment, yes.

Q. And then you took your hand away?

A. After I put it back on him?

Q. Yes, sir.

A. No, sir. It never left him again.

Q. So you held him continuously, your flashlight and Mr. Tuttle by the shirt after that, is that right?

A. I believe that's correct.

Q. Even when he broke from you, you were holding him just when he broke from you?

A. I believe that's correct.

Q. And he ran out the door?

A. Yes.

Q. Turned and ran?

A. Yes.

Q. Are you sure?

A. That's the way I remember it.

Q. But when he reached down, when you saw him reach down, according to your testimony — you understood the barmaid (p. 569) said that didn't happen, you heard her say that?

A. Yes.

Q. When you say you saw him reach down, that could have been the movement of a person merely scratching his leg, couldn't it, sir?

A. It's possible.

Q. And at that point, you felt like you had control of him, didn't you, sir?

A. I don't recall my exact feelings except that I felt like I had the robber.

Q. Pardon me?

A. I felt like I had the robber.

Q. Well, if you felt like you had the robber, you didn't search him, or handcuff him, or physically restrain him, other than just putting your hand on him, did you, sir?

A. That's correct.

Q. And nobody had told you that there was an armed robbery inside the bar, had they?

A. No, sir.

Q. And the reason you didn't search him, or handcuff him, or physically restrain him was because you felt like you had control of him; is that right?

A. For the moment.

Q. And after you say he bent down the second time, you said you pushed him against the door to straighten

him up, and the (p. 570) door opened slightly outward; do you remember that?

A. Yes.

Q. And the subject continued looking at his feet? Do you remember?

A. Yes.

Q. And at this point, this is when you say the barmaid first came over?

A. That's correct.

Q. So at this point, the only substantial difference between your testimony and their testimony, is you have the bartender coming up later, and they say didn't see any movements towards the feet. Does that sound about right?

A. I believe that's right.

Q. And you asked her if she had called to report an armed robbery? You remember you put that in your report?

A. Yes, sir.

Q. And she said, "robbery." That's what you put in your report?

A. Yes.

Q. And at that time, Mr. Tuttle turned and ran out the door? Is that your testimony?

A. He started pulling away when I said, when I asked her the question.

Q. And did he turn and run out the door?

A. Yes, sir. He did.

Q. Now are we speaking of this door here, the west door (p. 571) (indicating)?

A. Yes.

Q. Incidentally, you didn't come in the east door, did you?

A. No, sir.

Q. You never made any entrance or exit through the east door at all, did you?

A. No, sir.

Q. And when he turned and ran out that door, you were still standing right here, is that right?

A. That's correct.

Q. And I believe your testimony was "the door sprang shut." It was spring levered?

A. Yes.

Q. Do you remember that? And when he turned and ran out that door, you saw him turn and run, didn't you, if you had your hand on him?

A. I was facing the barmaid.

Q. Well, as I understand it, you're facing this way and you're holding him like this, although you're being careful to keep an eye on him, right?

A. Correct.

Q. And he's got his back to the door?

A. Yes.

Q. And he—she said, "robbery," and at that moment, he turned around and runs right out that door, and the door slams back (p. 572) in your face; is that right?

A. That's when he—he had already made that movement before she ever said anything.

Q. But did you see him go face first out that door?

A. My mind right now, I can't say that I did.

Q. Well, you had your hand on him?

A. That's correct.

The Court: May I see counsel at the bench?

Mr. Hughes: Yes, sir.

(The following procedures were had at the bench out of the hearing of the jury:)

The Court: We're going to have to take a luncheon recess, as I have a scheduled pretrial conference. I think I'll have the jurors come back at two o'clock and resume at that time. But in the meantime, I want you gentlemen to confer with my law clerk at 1:15 about proposed instructions. Okay. I'll excuse the jurors until 2:00, and you get together at 1:15.

Mr. Hughes: Thank you, Judge.

(The following procedures were had within the hearing of the jury:)

The Court: Ladies and gentlemen of the jury, I apologize for keeping you late during the luncheon hour, but we were hoping to complete the defense of this case prior to recess for lunch. It appears that that's not quite possible. (p. 573) I'm going to allow you until two o'clock

to have lunch and ask you to be back in the jury assembly room at 1:55, and we will resume shortly thereafter. I have another matter scheduled at 1:30, which might overlap just a bit beyond that two hour starting period, 2:00 P.M. starting period, but I hope not. I'll remind you again of my previous admonitions. Everyone please stand. Court in in recess.

(Noon recess)

(p. 574) The Court: Be seated, please, ladies and gentlemen of the jury. Go ahead, Mr. Hughes:

Mr. Hughes: Thank you, Judge.

Julian Rotramel

(Continuation of cross-examination)

By Mr. Hughes:

Q. Before we left, you told me several times about how Mr. Tuttle had turned and run face first out the door. Officer Rotramel, that isn't exactly true, is it, sir?

A. That I said he ran face first out the door?

Q. Yes, sir.

A. I didn't say that, did I?

Q. You said you saw him, he had his back to the door and that you saw him turn and run out the door, didn't you?

A. No, sir. I believe I said that I was more facing the barmaid, and I had my hand on him as he left.

Q. Do you deny that you told this jury on several occasions before we broke for lunch that you were holding

him by the hand, and then he turned, he had his back to the door, and then he turned and ran out the door?

A. That's what happened, yes.

Q. But the truth of the matter is, as related in your report, the suspect backed out the door; didn't he, sir?

A. That's what I had written there.

Q. Now, the honest to goodness truth of the fact, you're a (p. 575) little hazy on the events that occurred out there, aren't you, sir?

A. Some of them, yes.

Q. Yes, sir. Well, when you made your report, you made your detailed report as the rule requires and Mr. Chambers told you to do, you left out some facts in the report; didn't you, sir?

A. No, sir. None that were pertinent, I don't believe.

Q. Well, you didn't put in your report that you made no investigation as to alternative entrances and exits, did you, sir?

A. Did I—no, sir. I didn't.

Q. And you didn't put in the detailed report that you didn't call for a backup, did you?

A. No.

Q. You didn't even put in the report that you never saw a weapon, did you, sir?

A. I don't believe it says that.

Q. You never put in the report that you didn't see anybody scared inside the bar? You didn't put that in there, did you?

A. I don't believe so.

Q. You didn't put in there that there didn't appear to be anything unusual going on inside either, did you sir?

A. No, sir.

(p. 576) Q. You didn't put anything in the report that would indicate that Mr. Tuttle wasn't acting like a tough guy or anything?

A. No.

Q. You didn't put any words to that effect, did you? Pardon me?

A. I didn't put any words to the effect that he was acting tough?

Q. Right.

A. No, sir.

Q. He was not acting tough?

A. That's not in my report.

Q. You didn't put anything in there about not having observed an armed robbery in progress in there?

A. No, sir.

Q. Now, again returning to the point and time when Mr. Tuttle broke from you and, as you said, ran out the door, you immediately at that point shouted "halt," didn't you?

A. As he broke from me?

Q. Isn't that what you put in your report, "I immediately shouted halt and ran out?"

A. Yes, sir.

Q. And when you shouted halt, according to your version of the event, you shouted it loudly; is that correct?

A. That's correct.

Q. That's how you described it?

A. Yes, sir.

(p. 577) Q. And you said that you shouted, and you said later that it was loud, or loudly, right?

A. Yes, sir.

Q. And at that point, as Mr. Tuttle, as you said broke from you and ran out the door, or as you put in your report, "backed out the door," you were not in danger of your life and had not been at least in terms of what you thought; is that right, sir?

A. As he left the club?

Q. Yes, sir. As he left the club.

A. No.

Q. Was my statement correct?

A. I believe so.

Q. Now, you came out the door, you said you "could see the suspect crouched down." That's what you say in your report, isn't it, sir?

A. As the door shut, I could see him crouched, yes.

Q. Okay. See if you can tell me where your report says anything about the door shutting. This would appear to be the portion where you were beginning to discuss it. You say, "As soon as I cleared the door, I could

see the suspect crouched down with his right hand near his feet."

A. That's correct.

Q. Right? And it doesn't really say anything about the door closing, does it?

(p. 578) A. Only in that I cleared the door and the door was spring loaded so—

Q. It doesn't say anything about it being spring loaded in there.

A. No, sir. It doesn't.

Q. But you recall of your own independent recollection that the door did close, is that right?

A. To the best of my knowledge, yes, sir.

Q. And when the door—after the door closed, according to your testimony, is the first time that you ever unholstered your weapon; is that correct?

A. I couldn't say exactly when.

Q. Didn't you testify that you drew as you cleared the door?

A. I believe it would be in that time we're talking about, a matter of seconds.

Q. When you say you cleared the door, what does that mean, sir?

A. That means that I came from behind the door. That is the diagram shows the door opened out in this manner.

Q. And after you got out, that's what you mean by clearing the door?

A. Yes, sir.

Q. And does that in you terminology include the door closing behind you?

A. Clearing the door would mean the door closing behind me?

Q. Is that what your—is that how you use the term?

(p. 579) A. Yes, sir.

Q. So are you now comfortable with the fact that you did not unholster your weapon until you cleared the door and it was closed?

A. No, sir.

Q. Do you recall in your deposition, page 65, lines 6 and 7, this question being asked and this answer being given:

"Question: But you drew down on him with the weapon?

Answer: As I cleared the door, yes."

Do you recall that question being asked and that answer being given?

A. I believe I do.

Q. Does that now refresh your recollection as to when your testimony is you first drew your weapon?

A. If that's what I said, then I must have had it drawn when I cleared the door.

Q. Do you recall?

A. To tell you the truth, I do not.

Q. Is that one of those facts that's a little hazy in your mind, too?

A. When I drew my weapon is hazy, yes, sir.

Q. Now, is there any doubt in your mind that when you fired you had the weapon at shoulder height or you were holding it up like this?

(p. 580) A. It would be higher than my waist and then the highest shoulder height.

Q. And you were holding the weapon with both hands?

A. I think so.

Q. At the moment that you pulled that trigger, was that door closed?

A. Yes.

Q. Are you sure of that?

A. Fairly certain.

Q. So according to your version of the event, with Mrs. Hinds and Mrs. Hayes still inside the bar, it would have been impossible for either or both of them to have seen the flame from your weapon as it's fired?

A. That's correct.

Q. Did your weapon flame?

A. I assume it did being it was at night and this weapon would make a certain amount of fire, flame.

Q. And it would have been a physical impossibility, according to your version, for those people to have seen it?

A. Yes, sir.

Q. They certainly were not outside with you, were they?

A. No, sir.

Q. Now, you say in your report as I read it that the suspect was crouched down when you cleared the door. Do you recall that?

A. Yes, sir.

(p. 581) Q. But you can't really describe to the court and jury what that—what you mean by crouched down, can you?

A. I could see it, but I could not describe it.

Q. You couldn't say if he was crouched down, for example, like a catcher? You can't say that, can you?

A. No.

Q. That's because you don't recall that, isn't that correct?

A. Well, I recall that he wasn't crouched like a catcher.

Q. Do you recall in your deposition this question being asked and this answer being given, on March 24, 1982, at page 65, lines 16 through 18:

"Question: Was he crouched down such as one would squat like a catcher?

Answer: I don't recall."

Do you recall that question and answer?

A. Yes, sir. I believe I do.

Q. Was that question asked and that answer given at your deposition?

A. If that's what it says, yes sir. (Whereupon, counsel showed deposition to witness.) Yes, sir.

Q. Is that what it says?

A. Yes, sir.

Q. And you can't tell us if what you observed out there was an individual crouched down like he was bending over to touch his toes, can you, sir? You don't recall that either, do (p. 582) you?

A. If he looked like he were touching his toes?

Q. Pardon me?

A. I'm sorry. I didn't understand the question.

Q. The question is was he crouched down like he was bending over to touch his toes?

A. If he was exercising in the parking lot?

Q. Pardon me?

A. Bending over to touch his toes?

Q. Yes, sir. When you described—you say he was crouched down.

A. No, he wasn't.

Q. We're trying to establish what the crouch was like.

A. Okay. You're correct.

Q. You were asked, just to refresh your recollection, was he bent over in a crouch like he was trying to touch his toes, and you said you couldn't recall that either, didn't you, sir?

A. Yes, sir.

Q. And you were also asked if he was crouched down like he was going to jump on somebody. Do you remember that?

A. Not specifically.

Q. But you couldn't recall even that, could you, sir?

A. If that's what the deposition says, yes. (Whereupon, counsel showed deposition to witness.) That's correct.

(p. 583) Q. Is that what the deposition says?

A. Yes, sir.

Q. In any event you pulled your—it's your testimony or your report, anyway—I guess your testimony here today—that you shouted halt for a second time when you saw him crouched down?

A. That's correct.

Q. And then at that point William Adam Tuttle was facing away from you, wasn't he, sir?

A. His body was.

Q. His back was for sure, wasn't it?

A. Yes, but his body was.

Q. And he was facing away from you, too, wasn't he, sir?

A. When I made my presence known by hollering a command, he turned his head towards me.

Q. Only his head?

A. To the best of my recollection, yes.

Q. When you saw him crouched, he was facing away from you, though, wasn't he?

A. Yes.

Q. Then you shouted halt again. This would be the second time, once when he broke from you and you said he ran out the door, and for the second time after you saw him in a crouch; is that right?

A. That's correct.

(p. 584) Q. And when you shouted halt again, you shouted it loudly, didn't you, sir?

A. Yes, sir.

Q. And it's your testimony that Mr. Tuttle then jumped up?

A. Yes.

Q. And you clearly saw him jump?

A. Yes, sir.

Q. Is that clear in your mind here today?

A. Yes, sir. It is.

Q. How high did he jump?

A. I couldn't say.

Q. Did he jump—did you see him move up?

A. Yes, sir. I did.

Q. Before you fired?

A. Yes, sir.

Q. So he was up when you fired?

A. He was coming up, yes.

Q. Was he standing up?

A. No.

Q. How far up was he as you would describe him?

A. I would describe him as half way towards completion of an upright stand.

Q. Would that be about like this (indicating)?

A. Yes, sir.

Q. So his back would be about a 45 degree angle to the ground?

(p. 585) A. I couldn't approximate.

Q. Well, that would be about half-way up, wouldn't it?

A. If you say so.

Q. I'm asking you.

A. I'm not very good at the angle.

Q. But that's when you fired, is that right?

A. I believe that would be correct.

Q. And he clearly already jumped when you fired?

A. Oh, yes, sir.

Q. Now, at this point and time, at the point that you pulled the trigger and brought him to his death, William Adam Tuttle had committed no felony; had he, sir?

A. As it turned out later, no.

Q. And you had made no attempt to run after him?

A. No, sir.

Q. You had made no attempt to get in your car and follow him if he fled?

A. No, sir.

Q. As a matter of fact, you had never even seen him pull his pants leg up so he could get into his boots, did you, sir?

A. No.

Q. And all this time, you, as an officer of the Oklahoma City Police Department, were watching for a weapon, weren't you?

A. Yes, sir. I was.

Q. You were—that's one of the major things you were (p. 586) concentrating on was watching for a weapon, is that right? Pardon me?

A. From Mr. Tuttle?

Q. From Mr. Tuttle.

A. Yes, sir. I was.

Q. And you never saw a weapon, did you, sir?

A. No, sir.

Q. And you never thought about shooting him in the arm or the leg?

A. No, sir.

Q. And you never thought about other types of apprehension that were available to you, did you, sir?

A. No, sir.

Q. And you had other types of apprehension available to you, didn't you?

A. At the time that I shot him?

Q. Yes, sir.

A. Apprehension wasn't the question at that time.

Q. My question, sir, is did you have—you did have, didn't you, other types of apprehension available to you—

A. Yes, sir.

Q. —at the moment you pulled the trigger?

A. Yes, sir.

Q. For example, you could have, quote, clobbered him with your flashlight?

(p. 587) A. Yes.

Q. Where was your flashlight?

A. In my left hand.

Q. At that moment when you pulled the trigger?

A. I believe it was, yes.

Q. So you're telling this jury that you were drawing down on a man holding a weapon with two hands and a flashlight, too?

A. That's correct.

Q. As a matter of fact, you could have done a lot of things other than what you did, couldn't you?

A. It is possible.

Q. And you had had training at the Oklahoma City Police Department which included these films, "Shoot! Don't Shoot!" is that right?

A. Yes, sir.

Q. And you knew what the regulations were in Oklahoma City, didn't you?

A. Yes, sir.

Q. A[illegible]ou knew that you were to bear in mind the value of human life, didn't you, sir?

A. Yes.

Q. And you knew that you were to exercise the utmost discretion in the use of your weapon?

A. Yes, sir.

Q. And you really didn't exercise the utmost discretion in the (p. 588) use of your weapon, did you, sir?

A. Yes, I did.

Q. You think you did?

A. Yes, sir. I did.

Q. If you had to do it over, would you do it again?

A. Yes, sir. I would have to.

Q. Without any hesitation?

A. Yes, sir.

Q. That's the way they trained you, isn't it?

A. I believe so.

Q. "The use of a firearm by an officer is not justified if an apprehension and/or arrect can reasonably be made without violence." Is that right, sir?

A. Yes, sir.

Q. At approximately 8:08 p.m. on the 4th day of October 1980, you could have arrested William Adam Tuttle reasonably and without violence, couldn't you, sir?

A. At what time?

Q. Approximately 8:08 p.m.

A. When I first arrived, yes, I could have.

Q. And you could have arrested him at any time, too, couldn't you, sir?

A. I could have tried.

Q. "The use of firearms is not justified when the use of deadly force"—well, "justified if used to fire a warning shot or (p. 589) apprehend a misdemeanant." You didn't fire any warning shot and William Adam Tuttle at that point was only a misdemeanant, wasn't he, sir?

A. As it turned out, yes, sir.

Q. Yes, sir. And that's all he was?

A. Yes, sir.

Q. And you had no way of knowing he was anything other, did you, sir?

A. Not at that time.

Q. "The use of deadly force is not to be used when the use of deadly force constitutes a greater threat to innocent human lives than allowing the criminal to escape." You knew that, didn't you?

A. Yes, sir.

Q. And you didn't follow that, did you?

A. Where does that apply?

Q. You don't even understand that? That the use of firearms is not justified when the use of deadly force constitutes a greater threat to innocent human lives than allowing the criminal to escape?

A. I was not concerned with his escape. It might well be.

Q. Well, let's see, you had a car here, didn't you?

A. Yes, sir.

Q. You knew that other units would be there shortly?

A. I felt like there would be.

(p. 590) Q. You had plenty of room for cover there if you had chosen that, didn't you?

A. Behind the car?

Q. Yes, sir.

A. No, sir. I couldn't have made it.

Q. You were only 6 to 8 feet from it at that time, is that right?

A. I would guess about 10 feet.

Q. So the testimony of the other officers would be inaccurate?

A. Yes, sir.

Q. You had a Kell light, didn't you?

A. I had a flashlight.

Q. Was it a Kell light?

A. I'm not certain of the brand name.

Q. It was in your hand?

A. Yes, sir.

Q. Mr. Tuttle wasn't armed, was he?

A. As it turned out, no, sir.

Q. And he really wasn't even—he wasn't making any attempt to kill you, was he?

A. As it turned out, he never had a chance.

Q. That's true. He never had a chance, did he?

A. He never had a chance to kill me.

Q. Because you killed him first?

A. I shot him first.

(p. 591) Q. And he died?

A. That's correct.

Q. Isn't that killing him first?

A. Yes, sir.

Q. Now, after this was over with, you had occasion to meet with other officers of the Oklahoma City Police Department, including the Acting Chief of Police, Captain Richard Delaughter, is that right?

A. I believe that's correct.

Q. Captain Delaughter—you heard him testify here in court?

A. Yes, sir.

Q. And do you recall meeting with Captain Delaughter on that evening?

A. No, sir. I do not.

Q. You don't deny meeting with him, do you?

A. If he said I did, then I did.

Q. Whatever he said would be right, wouldn't it?

A. Yes, sir.

Q. And when you met with him—let's just assume hypothetically that you did meet with him that night.

A. Yes, sir.

Q. If—you knew him, didn't you?

A. Yes, sir.

Q. And you knew that he was the main man in charge of the Oklahoma City Police Department that night, didn't you, sir?

(p. 592) A. I knew he was shift commander for my shift, yes.

Q. And you knew he was a field captain?

A. Yes, sir.

Q. And you knew that field captains are the acting chiefs after hours and on weekends, didn't you?

A. No, sir. I didn't know he was the acting chief.

Q. Well, you knew he was the head man on that shift anyway, didn't you?

A. Yes, sir. I did.

Q. And you, of course, would try to tell him the truth as best you could?

A. Yes, sir. I would.

Q. And did you know Officer S. Moss, I believe it's Stanley Moss?

A. Yes, I know him.

Q. And were you—did you meet with him that night?

A. I don't recall. I don't believe so.

Q. Well, he was interested in the case because he was investigating it, wasn't he?

A. I believe he was just to go with Mr. Tuttle to the hospital.

Q. Maybe I used the term investigated too loosely. He was on the scene and he went with the Hill fellow to follow the—he said he followed the ambulance to the E.R. Room; is that right?

A. If that's what he said, yes.

(p. 593) Q. Yes. So you would assume he was interested in the case, wouldn't you?

A. Yes, sir. I would.

Q. Now, do you recall when you made your, gave your deposition, an inquiry was made of you as to whom you had talked to with regard to the incidents out there on October 4, 1980?

A. Yes, sir. I remember that.

Q. And do you remember that nowhere in your deposition did you mention talking to Captain Delaughter?

A. No, sir. I don't recall saying that, but I don't remember talking to Captain Delaughter that night. (Whereupon, counsel handed deposition to witness.)

Q. We excluded in the inquiry, mothers, dads, brothers, sisters, and lawyers; is that right? We didn't ask you about that?

A. Yes, sir.

Q. Of course, Captain Delaughter wouldn't fit into any of those categories, would he?

A. No, sir.

Q. Have you read that now?

A. Yes, sir.

Q. Nowhere in there do you mention that you talked to Captain Delaughter, do you?

A. That's correct, sir.

Q. But you do mention that you talked to Stan Moss?

A. Yes.

(p. 594) Q. Pardon?

A. I said I believe so. Is that what it says?

Q. Yes, sir. I believe that's what it says. And when you talked to Officer Moss, you told him that you went in the east door, didn't you, sir?

A. Sir, I don't recall talking to Officer Moss.

Q. Well, you heard his testimony by deposition in this case, didn't you?

Mr. Mahoney: Your Honor, I object. He's already said he didn't recall.

The Court: Sustained.

Q. Maybe I can ask it this way. Did you tell Officer Moss that you went in the east door on the night in question?

A. No, sir.

Q. You deny that?

A. Yes, sir. I don't recall telling anyone I came in the east door.

Q. Okay. And you heard Captain Delaughter testify that you told him that you responded to an armed robbery call, went inside the bar, and asked the barmaid if a robbery was taking place, and the barmaid said she had no knowledge of this?

A. I —

Q. Do you recall that?

A. I remember him testifying that.

Q. And he also testified that you told him that shortly after (p. 595) these events on the 4th of October of 1980, isn't that right?

A. That's what he said, yes.

Q. And you don't deny what he said, do you, sir?

Q. Now, you recall you were aware at the Oklahoma City Police Department a memo that circulated around there, weren't you, sir?

A. In reference to this case?

Q. Yes, sir.

A. Yes, sir.

Q. And what did the memo say?

A. I was told that it said in reference to —

Mr. Mahoney: Your Honor, I'll object to that as hearsay to him. He hasn't seen the memo.

The Court: Sustained.

Q. Do you know that the memo said: "In the matter of Oklahoma City Police versus William Tuttle, we aim to please?"

Mr. Mahoney: Objection.

The Court: Sustained, I believe, counsel. He said he was told that. He doesn't know of his own.

Q. Oh, did you see the memo?

A. No, sir. I did not.

Mr. Hughes: May I have just a moment, Your Honor?

The Court: Sure.

Mr. Hughes: Excuse me, just a second, Your (p. 596) Honor. Your Honor, may I approach the bench?

(The following proceedings were had at the bench out of the hearing of the jury:)

Mr. Hughes: Do you—I don't want to get in trouble. Do you not want me to ask him any other hypothetical questions?

The Court: No. I don't think he needs to go into that. Probably not. Hypothetical would have a bearing on what he should have done from other officers, but I don't think there's any point in asking him. He's testified as to what he did under the circumstances. Redundant and waste of time, counselor.

Mr. Hughes: That's why I asked.

(The following proceedings were had within the hearing of the jury:)

Q. At the time that Officer Lennox came upon the scene and you first saw him, were you holding your weapon on Mr. Tuttle at that time?

A. As best I recall, I believe I was.

Q. Okay. Would it be fair to say that you were merely acting on suspicion in your attempts of apprehending William Adam Tuttle on that night?

A. Yes. That would be correct.

Q. And you were taught in your training film, "Shoot! Don't Shoot!," that you couldn't just act on suspicion, weren't (p. 597) you?

A. I believe that's correct.

Q. And when you were trained, did they at the Academy give you anything upon which to make discretion judgments? You know, did they give you certain factors to weigh in making a discretion judgment such as you made on the 4th day of October 1980?

A. I don't believe so.

Q. Now, they did give you a course, as I understand, on civil rights; is that right?

A. That's correct.

Q. And you understood that a citizen of the United States in Oklahoma City or even Bartlesville, has the constitutional right to a trial to face his accusers and things of that nature, didn't you, sir?

A. Yes, sir.

Q. And you knew that a person had the right under our constitution not to be deprived of life, liberty, or the pursuit of happiness; didn't you, sir?

A. Yes, sir.

Q. And at the moment you pulled that trigger, you were well aware of those rights; weren't you, sir?

A. Yes.

Mr. Hughes: I believe that's all, Your Honor.

The Court: Anything further?

• • •

(p. 135) The Court: Sure.

Mr. Gassaway: "Oklahoma City Ordinance, Division 1, Offenses against public safety, interfering with a city officer or officials." In part, Section 21-27: "No person shall resist or lend aid to resist against any officer discharged with the duty, or break or attempt to break from custody after having been arrested and taken into custody, or harass or attempt to harass or mislead any officer by false alarms or unauthorized use of any device of whatever nature to summon police or fire protection or other emergency aid without reasonable cause. $35 fine."

Mr. Gassaway: I'll proceed with Officer Lennox, now. "In the United States District Court for the Western District of Oklahoma, Rose Marie Tuttle . . . "

The Court: You can waive that if you want to, Mr. Gassaway.

Mr. Gassaway: Thank you, Your Honor, I'll just read —

The Court: We'll take notice that it's in this style case, and that the deposition was taken on March 22, Michael Gassaway appearing for the plaintiff, Richard Mahoney for the defendant.

(p. 136) Mr. Gassaway: Thank you very much, Your Honor.

(Whereupon excerpts from the deposition of Riley Lennox were read into the record:)

"Q. Would you state your full name for the Court and record, please, sir?

A. Riley L. Lennox.

Q. Where do you live, Mr. Lennox?

A. 123 N. W. 15, Oklahoma City.

How old a man are you?

A. 39.

Q. What is your business or occupation?

A. Police officer of the Oklahoma City Police Department.

Q. What is your job title there?

A. Patrol Officer.

Q. How long have you been employed as an Oklahoma City police officer?

A. Four years.

Q. On or about the 4th day of October, 1980, did you have occasion to investigate a shooting at the corner of Northwest Tenth and Portland?

A. I had occasion to be present, yes, sir.

Q. Can you tell me how you came about being present at that scene?

A. Through a dispatch radio call that came over all (p. 137) channels in reference to an armed robbery in progress.

Q. Do you know Officer Rotramel?

A. Yes, sir. I do.

Q. Did you know him at the time of the investigation of this armed robbery in progress?

A. Yes, sir.

Q. When you got this call, approximately what time of day or night was it?

A. Exactly, I don't recall. It was after dark.

Q. The report says at 20:08 hours. When would that have been?

A. That would be 8:08 P.M.

Q. Was that fairly accurate to the best of your recollection?

A. Yes, sir.

Q. Did you all have a specific school in police training on handling an armed robbery call?

A. Yes. We had a block in that.

Q. If you're riding in a patrol car by yourself and you get a call about an armed robbery in progress inside a bar, what were you taught as far as how you handle that?

A. Totally on how to handle it?

Q. Yes.

A. Number one, if you do not have one assigned to you, (p. 138) request a backup unit. Number two, do not approach the business or residence, whatever it may be, directly in front, and approach slowly and with caution.

Q. By saying not to approach it directly in front, does that mean to work a side door or back door as opposed to going in the front door?

A. No, sir. I mean by that don't pull your car directly in front of the front door and get out in front of the front door.

Q. I see your report says that you called the dispatcher and said you were a 1097. Does that mean you arrived at the scene?

A. Yes, sir.

Q. Did you get inside the building before anything unusual happened?

A. No, I did not.

Q. What, if anything, unusual did happen at that time?

A. I heard what I thought to be a gunshot coming from the other side of the building.

Q. What did you do?

A. I proceeded to the west side of the building along the south wall.

Q. How far did you get?

A. I was approximately halfway along the south wall of the building when I observed the subject on the

ground (p. 139) in the parking lot, not directly in front of me, but approximately 20 feet or so in front of me."

Mr. Gassaway: May I approach the witness, Your Honor? "Proceeding along the south portion of the building going to the southwest corner (pointing to drawing).

Q. Would you place in the parking lot in reference to the southwest corner of the building where you would be in relation to the southwest corner of the building?

A. Approximately, as best as I can recall, maybe six feet of the southwest or south wall and two to three feet west. That's an estimation."

Mr. Gassaway: Would you point that out, Mr. Hughes?

Q. Is there a sidewalk there?

A. Yes, sir. There is.

Q. Was he on or off the sidewalk?

A. Off the sidewalk.

Q. Would it be fair to categorize him as close to the edge of the sidewalk?

A. He was within a few feet.

Q. Like a step or two?

A. Yes, that would be a good approximation.

Q. What appeared to be the condition of the subject?

A. Well, initial appearance, he was doubling over from where I was standing when I first observed him. And that (p. 140) was it, the subject on the ground doubled over.

Q. Did he appear to have been shot?

A. Not at that moment, no.

Q. So you couldn't see any blood at that time?

A. No, sir.

Q. Was he on his elbows or knees or was he on his back doubled up or his side doubled up?

A. As I recall initially, he was, I believe, on his knees, if I remember correctly. I'm not sure.

Q. What did you do when you saw the man on the ground?

A. The next thing I observed was Officer Rotramel. As I proceeded down the sidewalk, Officer Rotramel was standing there north of him.

Q. What was he doing?

A. He was standing there holding his service revolver on the subject.

Q. How far from the subject was he?

A. Again, it would be an approximation, but I'd say six to eight feet.

Q. Was he at the front door of the Club?

A. Adjacent to it.

Q. Was anything said at that time?

A. By myself?

Q. By either one of you?

A. Officer Rotramel, his exact words I don't recall, (p. 141) he hollered at me something to the effect, check his boot, he was going for something, check his boot.

Q. Did you?

A. Yes, sir. I did.

Q. Did you observe anything?

A. No. I didn't observe anything.

Q. Did you find anything?

A. No. Of course, I didn't stick my hand down in his boots at all. All I did was grab the top portion of the boot where — I don't know what I want to call it — the upper portion of the boot where —

Q. Like the loop where you pull them up, is that what you're talking about?

A. I took my hand and just squeezed around.

Q. Squeezed the top of the boot?

A. One hand and squeezed the top of the boot, yes.

Q. Were they cowboy boots?

A. I don't recall. I believe they were.

Q. You squeezed the top of the boots because Rotramel said check for a gun, right?

A. No. He said check his boot, he was going for something.

Q. In your mind did you think he would go for a weapon?

A. In my mind that's what I thought.

(p. 142) Q. You checked the boots to your satisfaction. There wasn't a weapon; is that correct?

A. Partially correct.

A. Well, let's say that the Operations Manual, like any police procedure manual, is the guideline.

Q. Is it the policy not to use firearms to apprehend a misdemeanant, a person who has committed a misdemeanor, either within or without your presence, the discharge of a firearm?

A. Yes, that's correct.

Q. Would it be fair to say that you shouldn't use your firearm except as a last resort?

A. That would be a fair statement.

Q. Hypothetically speaking, I would like for you to assume these facts to be true, just a pure hypotheatical question: One, that you received a call of an armed robbery in progress. Okay?

A. Uh-huh.

Q. Two, that the armed robbery in progress call relates to an armed robbery in a bar. Three, that you arrive at the bar by yourself, entered the premises, and were advised that there was no armed robbery in progress. Four, and a man fled the bar. Five, that you apprehended or attempted to apprehend the man and he (p. 144) fled from you. Would you shoot him?"

Mr. Mahoney: Your Honor, I object. That's a false hypothetical and, in addition, Officer Lennox is not a man who is supervisory personnel of the police department and qualified to give that answer.

The Court: Overruled.

"Q. Would you shoot him?

A. Based on those facts only?

Q. Well, you wouldn't have left the man laying there alive with a weapon in his boot if the officer thought there was a weapon there, would you?

A. No.

Q. Did you follow police policy and regulations in checking the boots the way you did?

A. No. As I stated, I didn't do a complete check of the boots like you would normally do.

Q. So your answer is no. You didn't follow policies and procedures if that's partially true? But to your satisfaction, you felt safe?

A. Yes.

Q. Did the victim tend to be fairly active either jerking around or trying to get up or flopping around? Can you categorize for us?

A. He wasn't flopping around per se. He was obviously in pain. He was bleeding badly. He was making an effort to get up. He was having difficulty breathing.

Q. Was he verbalizing?

A. Yes.

Q. Just crying, yelling, or was he saying words?

A. The only thing I can recall he was saying was that (p. 143) he couldn't breathe.

Q. Let me ask you this: Are you supposed to follow the Oklahoma City Police Department Operations Manual in the use of firearms?

Q. Yes, sir.

A. Based on that, no, I wouldn't shoot him.

Q. Now, let's assume all of those facts and add this additional fact, that he stumbled off the side of this sidewalk, and you couldn't decide whether he was stumbling off the sidewalk, or he was reaching for something in his boot. Would you shoot him?"

Mr. Mahoney: Your Honor, I object to that. The fact that he was stumbling or reaching are not the evidence at this point.

The Court: All right. Overruled.

Q. You may answer.

A. Well, you're placing me in the difficult situation because you're saying he stumbles off. Actions play a big role and what is said by the officer to the suspect and his response plays a big role.

Q. Now, you haven't had any communication between the suspect (p. 145) and the officer. Nothing is said. No words of apprehension such as "halt! stop!," or whatever at this point and time of the hypothetical. The suspect merely runs from the bar. The officer goes outside, and the officer observes the man, which was a judgment call as to whether he was stumbling off the curb or whether he was reaching down towards his boot. Based only on those facts, would you shoot the man?

A. Nothing has been said?

Q. Nothing has been said by either party.

A. The man's merely bending down?

Q. Either bending down or stumbling, you can't tell which.

A. Just merely bending?

Q. Yes.

A. In that case, no. I wouldn't shoot him.

Q. Let's add these additional facts to those, that the officer said, "halt!," and then the man appears to either stumble or to reach down, would you shoot him?

A. No.

Q. Let's say the man bends over and looks back at the officer, looks back, and the officer says, "halt!," and the guy just stands there and just looks at him. Would you shoot him?

A. Stays down. By that you mean —

Q. Stays down in a crouched position.

A. Stays still and just looks?

Q. Stays still and looks, freezes.

(p. 146) A. Where are his hands?

Q. Down by his boots in his front.

A. No, I wouldn't shoot him.

Q. Let's say the man stumbles, falls to the ground, and gets back up and starts running, would you shoot him?

A. Based on the previous circumstances, no.

Q. Assuming all the other facts and adding that one?

A. No.

Q. Let's say the man doesn't stumble, doesn't reach for his boots, just runs, would you shoot him?

A. No.

Q. Let's say the man stops, turns around, and starts running back at you, no apparent furtive moves of any

type, just stops, turns around, and starts running straight back at you. Would you shoot him?

A. No."

Mr. Gassaway: Okay. That's all, Your Honor.

The Court: Do you wish to read any excerpts at this time, Mr. Mahoney?

Mr. Mahoney: Yes, Your Honor.

The Court: You can do so now or reserve them to later, whichever you prefer.

Mr. Mahoney: I prefer to do so at this moment, Your Honor.

The Court: Fine. Go ahead.

(p. 147) Mr. Mahoney: Mr. Hughes, page 23. Mr. Gassaway's read lines 13 through 26. If he could read those and continue to page 24, line 13.

"Q. You squeezed the top of the boot because Rotramel said check for a gun, right?

A. No. He said check his boot, he was going for something.

Q. In your mind, did you think he would go for a weapon?

A. In my mind that's what I thought.

Q. Checked the boots. To your satisfaction there wasn't a weapon, is that correct?

A. Partially correct.

Q. Well, you wouldn't have left the man laying there alive with a weapon in his boot if the officer thought there was a weapon there, would you?

A. No.

Q. So at least to that extent you were satisfied he didn't have a weapon, would that be a fair statement?

A. Partially correct. The reason I just squeezed the top of the boot itself is because I, yes, was thinking weapon, thinking gun, and my first assumption was that if there was a gun in the boot, it would probably be able to be felt at the top of the boot. However, the victim, too, was at that time squirming because of his wound making it very difficult for me to do the type of search that I normally would have done to someone. Therefore, I squeezed the top of the boot. I (p. 148) also had his pockets in his shirt and pants."

Mr. Mahoney: That's all.

Mr. Gassaway: Let me finish it up.

"Q. And found no weapon.

A. At that time I didn't."

Mr. Gassaway: Okay.

The Court: You may step down. Call your next witness, Mr. Gassaway.

• • •

(p. 462) Mr. Mahoney: Riley Lennox

The Court: Raise your right hand and be sworn, please. Swing that microphone so you can speak directly into it.

A. Yes, sir.

Riley Lennox

Called as a witness, having been first duly sworn, testified as follows:

Direct examination

By Mr. Mahoney:

Q. Officer, state your name and occupation, please.

(p. 463) A. Riley Lennox, police officer, Oklahoma City Police Department.

Q. Officer Lennox, were you employed by the police department on October 4, 1982?

A. Yes, sir. I was.

Q. Officer, on that night about, shortly after eight o'clock, were you at the Will Do Club at Tenth and Portland?

A. Yes, sir.

Q. What brought you there?

A. I was a backup unit of a robbery in progress call.

Q. When did you arrive at the Will Do Club?

A. The time?

Q. Yes, Sir.

A. Exact time, I don't recall. Just momentarily after the call came out.

Q. Where did you pull your car?

A. To the southeast corner of the building.

Q. Okay. There's a sketch up there behind you, the center block being the Will Do Club. Will you point where your car was?

A. Right here.

Q. All right. What did you do when you arrived?

A. I opened the car door and began to step out because I was going to approach the rear door.

Q. Did you approach the rear door?

A. No, sir.

(p. 464) Q. Why not?

A. At the time I opened the door and stepped out, I heard a gunshot.

Q. Could you tell where the gunshot came from from where you were standing?

A. Exactly, no, but I assumed at the time that it came from the front. That's where I could see.

Q. Okay. What did you see when you came out to the front?

A. I saw Officer Rotramel standing—you want me to show you on the map?

Q. Yes, sir.

A. Approximately here (indicating), another subject later identified as Mr. Tuttle in the parking lot.

Q. About where?

A. About where the exit is.

Q. All right. Did Rotramel say anything to you?

A. Yes, sir. He did.

Q. What did he say?

A. He said, "Check his boot, he was going for something in his boot."

Q. Did you check his boot?

A. I checked it as best I could, yes, sir.

Q. How did you check it?

A. I just merely with my hand clasped the top of the boot, both boots, around the top portion.

(p. 465) Q. All right. Is that a thorough search?

A. No, sir. It's not.

Q. Is that the kind of search you normally do on a suspect?

A. No, sir.

Q. Have you ever known suspects to keep weapons in their boots?

A. Yes, sir.

Q. Why didn't you search his boot thoroughly?

A. Well, for a couple of reasons. Number one, the—to rise. He was bleeding profusely. And second, he did not appear in my opinion to be a particular threat at that moment, so I merely just grabbed the boot around the top portion to see if I felt anything at that time, and that was the best I could do at the moment.

Q. Did you stay with Mr. Tuttle?

A. Yes, sir, I did. I stayed with him until the ambulance arrived.

Q. Officer Lennox, have you in your experience—how long have you been a police officer?

A. Four-and-a-half years.

Q. Have you searched several suspects for weapons in that time?

A. Yes, sir.

Q. Have you ever missed any weapons?

A. Yes, sir. Once or twice.

Mr. Mahoney: No more questions.

(p. 466) *Cross-examination*

By Mr. Hughes:

Q. Officer Lennox, did you give your deposition on the 22nd day of March, 1982, at the offices of Freelance Reporters, 406 Park Harvey Center?

A. Yes, sir. I did.

Q. And was Mr. Gassaway present at that time and Mr. Mahoney, who sits here, present at that time?

A. Yes, sir. That's correct.

Q. And did you give your testimony under oath at that time?

A. Yes, sir.

Q. Were you sworn to tell the truth?

A. Yes, sir.

Q. And did you tell the truth to the best of your ability?

A. Yes, sir.

Q. Now, digressing a little bit, are you a graduate of the Oklahoma City Police Training Academy?

A. Yes, sir. I am.

Q. Did you go there upon your initial employment at the police department for a period of approximately 18 weeks?

A. Yes, sir.

Q. And in that training, were you taught—were you given, for example, a copy of the Oklahoma City Police Department Operations Manual?

A. Yes, sir.

(p. 467) Q. And were you told to read and to study that manual?

A. Yes, sir.

Q. And did you read and study that manual?

A. Yes, sir.

Q. And are you generally familiar with it?

A. Generally, yes, sir.

Q. And do you try to, as an officer of the Oklahoma City Police Department, are you required to follow the policies and procedures as outlined in that manual although they may be changed from time to time?

A. As best you can, yes, sir.

Q. Yes, sir. Now, when you approached the scene, I believe you said you got out of your car and you heard a shot?

A. That's correct.

Q. Then you proceeded on the diagram there in a generally westerly direction toward the suspect?

A. That's true.

Q. Is that right?

A. Yes, sir.

Q. Who you later found out to be Mr. Tuttle?

A. Yes, sir.

Q. And when you arrived at the suspect, could you see Officer Rotramel?

A. Yes, sir.

Q. Or maybe before you got there, but you came up to a point and (p. 468) time as you came westerly along that building, where you could see both Mr. Tuttle and Mr. Rotramel; is that right?

A. Yes, sir, eventually.

Q. And at the point when you saw Officer Rotramel and Mr. Tuttle, what was Officer Rotramel doing?

A. If I recall correctly, he was, at that moment he had his hand-held radio in his hand and he was talking to the dispatcher advising them to call an ambulance.

Q. Are you sure he wasn't standing there with his gun on him?

A. No, sir. I'm almost positive that he had his—he has his radio in one hand. I don't recall which hand, and he was talking to the dispatcher.

Q. In any event at some point and time, he told you to "check his boot, he was going for something," is that right?

A. I don't remember the exact words but, yes, he did ask me to check his boot.

Q. And when he said—but he said, "he was going for something," didn't he?

A. I'm not sure those were the exact words.

Mr. Hughes: Excuse me just a minute, Your Honor.

Q. Well, let's back up just a little bit. You said, as you recall, that Officer Rotramel as you first approached him was on his hand-held radio, is that right?

A. That's what it seemed to be, I believe so.

(p. 469) Q. All right. If you recall your deposition given on March 22, 1982, if you recall the following questions being asked and the following answers that you gave, beginning at page 19, line 20.

"Question: What did you do when you saw this man on the ground?

Answer: The next thing I observed was Officer Rotramel. As I proceeded down the sidewalk, Officer Rotramel was standing there north of him.

Question: What was he doing?

Answer: He was standing there holding his service revolver on the subject."

Do you remember those questions being asked and those answers being given?

A. Yes, sir. I do.

Q. And you recall that he was standing approximately at that point holding his service revolver on him 6 to 8 feet from Mr. Tuttle?

A. Yes, sir. I recall saying that.

Q. Adjacent to the front door of the club?

A. Is that a question?

Q. Yes. Is that where he was?

A. Well, exactly where in relation to the front door, he was on the front sidewalk there, yes.

(p. 470) Q. And Officer Rotramel said, "Check his boot, he was going for something, check his boot?"

A. That's what I just said. He did tell me to check his boot. I don't know exactly what his exact words were. He was going for something and he did tell me to check his boot.

Q. But he didn't tell you he was going for a gun?

A. Not that I recall, no.

Q. He didn't tell you he was going for a knife?

A. No, sir.

Q. He didn't tell you he was going for any type of weapon, did he?

A. He didn't mention a specific weapon if that's what your question is.

Q. No. He said "something," didn't he?

A. I guess he did. I don't know.

Q. Well, that's what you said under oath he said, wasn't it?

A. Yes, sir. And that's what I told Mr. Gassaway the best of my recollection, that's approximately what he said. I know that he told me to check his boot.

Q. At that moment were you acting as an officer of the Oklahoma City Police Department?

A. Yes, sir.

Q. Subject to the policies and procedures of the Oklahoma City Police Department?

A. Yes, sir.

(p. 471) Q. And at that point and time, were you concerned, as an officer of the Oklahoma City Police Department, that there might be some type of weapon in the suspect, in the suspect's boot?

A. Yes, sir.

Q. Are you familiar with the procedure, policy and procedure, paragraph 17.05?

A. Yes, sir.

Mr. Mahoney: Your Honor, I believe that's beyond the scope of direct examination.

The Court: Pardon me?

Mr. Mahoney: I object to that. I think that's beyond the scope of direct examination.

The Court: Overruled.

Q. Are you?

A. Yes, sir.

Q. And this was in full force and effect on October 4, 1980?

A. Yes, sir.

Q. And the policy and procedure of the Oklahoma

City Police Department is "thoroughly searches male suspects for weapons," is that right?

A. That's what it says.

Q. Now, in terms of responding to an armed robbery call in progress, is it a fair statement to say that you are, number one, if you do not have one assigned to you, you should (p. 472) request a backup unit?

A. That's a fair statement.

Q. Number two, you do not approach the business or residence, whatever it may be, directly in front?

A. That's correct.

Q. And you approach slowly and with caution?

A. Yes, sir.

Q. And if it's a blind building, you definitely wait for a backup, is that right?

A. That depends on the building and the circumstances.

Q. Should you wait for a backup if it's at all possible?

A. It would be a good idea, yes, sir.

Q. Now, the boots that you searched—

A. Yes.

Q. —of Mr. Tuttle's, were they cowboy boots?

A. I don't recall exactly. I believe they were.

Q. And you checked those boots that night, didn't you?

A. Well, no, I didn't actually check those boots. As I said, I grabbed the top portion of the boot around his calf.

Q. Let me ask this simpler, you wouldn't have left a man lying there alive with a weapon in his boot if the officer thought there was a weapon in there, would you?

A. Probably not.

Q. It's not a probably not, you wouldn't have done it, would you?

(p. 473) A. That again depends on the circumstances, whether or not you can conduct a full search at that time.

Q. Let me ask if you recall in your deposition this question being asked and this answer being given on page 23, beginning at line 23:

"Question: Well, you wouldn't have left a man laying there alive with a weapon in his boots if the officer thought there was a weapon there, would you?

To which you answered, 'No.'"

Do you recall that question being asked and that answer being given?

A. Yes, sir. I do.

Q. You didn't say, "Probably not," did you?

A. No.

Q. You said, "No." Isn't that correct?

A. That's correct.

Q. And you also know that you, as an officer of the Oklahoma City Police Department, are not to use a firearm except as a last resort, isn't that right, sir?

A. That's correct.

Q. Would you, sir, assume the following hypothetical to be true: One, that you had received a call of an armed robbery in progress. Two, the armed robbery in progress call related to an armed robbery in a bar. Three, that you arrived at the (p. 474) bar by yourself, entered the premises, and were advised there was no armed robbery in progress. Four, that a man fled the bar. Five, that you apprehended him or attempted to apprehend the man, and he fled from you. Would you shoot him?

A. I can't answer that directly. That would depend on what actually took place in front of me.

Q. And do you recall again when your deposition was taken on the 22nd day of March, 1982?

A. Yes, I do.

Q. Let me ask you if you recall these questions being asked and these answers being given, page 39, beginning at line 19, or line 20:

"Question: Hypothetically speaking, I'd like for you to assume these facts to be true, just as a pure hypothetical question: One, that you had received a call of an armed robbery in progress, okay?

Answer: Uh-huh.

Question: Two, that the armed robbery in progress call related to an armed robbery in a bar. Three, that you arrived at the bar by yourself, entered the premises, and were advised there was no armed robbery in progress. Four, that a man fled the bar. Five, that you (p. 475) apprehended or attempted to apprehend the man and he fled from you. Would you shoot him?

Answer: Based on those facts only?

Question: Yes, sir.

Answer: Based on that, no. I wouldn't shoot him."

Do you recall those questions being asked and those answers being given on the 22nd day of March 1982?

A. Yes, I do.

Q. And you didn't say there I can't answer those questions, did you, sir?

A. No.

Q. But if you would then continue to assume all of those facts that I gave you before and add this additional fact that he, the victim, stumbled off the side of the sidewalk and you couldn't decide whether or not he was stumbling off the sidewalk or if he had reached for something in his boot, still have had no communication between the officer and the suspect, nothing is said, no words of apprehension, such as, "halt! stop!" or whatever, the suspect merely runs from the bar. The officer goes outside and the officer observes a man, which is a judgment call as to whether he is stumbling off the curb or is reaching down for his boot. Based upon those facts, would you shoot the man?

A. Probably not.

Q. Do you recall when your deposition was given in this case?

(p. 476). A. I don't recall my answer.

Q. It was, "No." Do you recall that?

A. No, but I'll take your word for it.

Q. Let's add these additional facts: The officer said, "Halt!", and then the man appeared to stumble or to reach down in addition to the other facts, would you shoot him?

A. Here again, I don't know. I don't know what took place.

Q. Do you recall when you gave your deposition and that question was asked and you said, "No." You didn't say, "Probably not." You said, "No."

A. I may have very well have.

Q. Did you talk to anybody about coming in here and testifying today?

A. No, sir.

Q. You didn't talk to anybody from the Police Department?

A. No.

Q. Your supervisor?

A. No, sir.

Q. Nobody from the City Attorney's office?

A. No, sir.

Q. Let's say in assuming these hypothetical facts, the man bends over and he looks back, and the officer says, "Halt!," and the guy stays down and just looks at him, would you shoot him then?

A. Possibly, but I don't know.

(p. 477) Q. Do you recall in your deposition on March 22nd that identical question was asked and you answered, "No?"

A. No. I don't recall that answer, but again I say if it's there, that's what I said.

Q. Well, let's add these additional facts. The officer said, "Halt!," and then the man appears to stumble or reach down, would you shoot him?

A. Probably not.

Mr. Hughes: May I approach the witness?

Q. Would you tell the jury how you answered that identical question in your deposition on March 22nd?

A. The answer is "no."

Q. Let's say the man bends over and looks back at the officer and the officer says, "Halt!," and the guy stays down and just looks at him, would you shoot him?

A. I believe my answer was "No."

Q. You said, "no, I wouldn't shoot him," didn't you, sir?

A. I believe I did, yes.

Q. Let's say the man stumbles, falls to the ground, and gets back up, and starts running, would you shoot him?

A. Probably not.

Q. Let's say the man doesn't stumble, he doesn't reach for his boot, and just runs; would you shoot him then?

Q. Let's say the man stops, turns around, and starts running (p. 478) back at you, no apparent furtive movements of any type, just stops, turns around, and starts running straight back at you; would you shoot him?

A. No.

Q. In essence you're not going to shoot a man until you know your life's in danger, are you, or someone else's life's in danger?

A. That's correct.

Mr. Hughes: May I have just a moment, Judge. Just one, I do have one more question.

Q. Now, as I understand your testimony when you were out there on the scene, you checked that boot as best you could? Right?

A. Under the circumstances.

Q. Yes, sir. And you waited for that ambulance to arrive, is that right?

A. That's correct.

Q. How long was it before that ambulance got there?

A. Exact time I don't know. It seemed like an awful long time.

Q. And during that time, did you have occasion to observe William Adam Tuttle?

A. Yes, sir.

Q. Was he in pain?

A. Yes, sir.

Q. Was he bleeding?

(p. 479) A. Yes, sir.

Q. I believe you said he was bleeding profusely, wasn't he?

A. Yes, sir.

Q. He was shot in the back, wasn't he?

A. I don't know exactly where he was shot.

Q. But he was complaining vigorously or complaining at least repeatedly that he couldn't breathe, wasn't he?

A. That's correct.

Q. Which would be totally consistent to being shot through the lung, wouldn't it, sir?

Mr. Mahoney: Objection, Your Honor.

The Court: Sustained.

Q. Was he alive?

A. Yes.

Q. During the entire time at the scene there at the hospital?

A. I wasn't at the hospital.

Q. I mean at the scene? That's what I'm trying to say.

A. Yes, sir. He was alive.

Q. And was he — was there more than one ambulance there?

A. I don't recall if more than one came or not.

Q. Well, they only took him away in one, didn't they?

A. Yes. That's correct.

Q. These police cars that you all put people in, they have—some of them have cages in the back, don't they?

A. Yes.

(p. 480) Q. Between the front seat and the back seat?

A. Yes.

Q. And they also, as I recall, in the back seat, the door handles are removed, isn't that right?

A. Well, they're not removed, but they're not operable.

Q. Well, they're not operable anyway. So, if someone such as a widow, or soon to be a widow, was put in the back seat of a patrol car, she would not be able to get out unless someone let her out, isn't that right?

A. That's true.

Q. And do you, of your own personal knowledge, recall seeing more than one ambulance at Northwest Tenth and Portland at the Will Do Club around 8:00 P.M. on October 4, 1980?

A. I don't know if there was more than one there.

Q. At the time that ambulance pulled out that you saw them put William Adam Tuttle in, at the time that ambulance pulled out, was William Adam Tuttle still alive?

A. To the best of my knowledge he was.

Q. Was he still breathing?

A. Yes, sir.

Q. Was he still talking?

A. No, he wasn't talking.

Q. Was he complaining about he couldn't breathe?

A. At the time they put him in the ambulance, I don't know.

Q. While you were with him, he was, wasn't he?

(p. 481) A. Yes.

Q. And how long a time lapse was it from the time you left him until the time they put him in the ambulance?

A. I don't really recall, a matter of minutes.

Q. Well, you were there when they put him in the ambulance, weren't you?

A. I wasn't standing at the ambulance door, no.

Q. Were you at Northwest Tenth and Portland?

A. Yes, sir.

Q. And how far away from the ambulance were you when you put him in there?

A. I was still at the same location that he was originally when they took him in the ambulance.

Q. How long had it been since you heard him say one word, any word?

A. I don't recall.

Q. Was there any doubt in your mind that Mr. Tuttle was in excruciating pain?

A. No, sir.

Q. He was, wasn't he?

A. Yes, sir.

Q. At any time when you were out there, did you ever turn your back on him?

A. No, sir.

Q. Not on any occasion?

(p. 482) A. Not that I recall.

Q. So you were always looking at him, is that right?

A. Yes, sir.

Q. So you could tell us how far away you were from him at the time he was placed in that ambulance.

A. Are you asking where I was in relation to him?

Q. Yes, sir.

A. At the scene?

Q. Yes, sir.

A. Or at the time they actually carried him away?

Q. At the time they placed him in the ambulance and closed the door.

A. I was still where the "X" is on your map when they took him in the ambulance.

Q. And that's where the ambulance was, isn't that right?

A. No, sir. The ambulance didn't come in that close.

Q. Where was the ambulance?

A. It was on the street somewhere, I don't know.

Q. You mean it didn't even come in the parking lot?

A. It was — I think it was in the parking lot, but it wasn't up here where I was.

Q. I'll show you what's been introduced in evidence as plaintiffs' Exhibit 4-E, which appears to be a shot show-

ing approximately where the blood splatter is, which would be approximately where this "X" is, is that right?

(p. 483) A. That's correct.

Q. Now, you were in that parking lot?

A. Yes, sir.

Q. That is the parking there, isn't it?

A. Yes, it is.

Q. And do you recall where in that parking lot the ambulance pulled up?

A. No, sir. I don't.

Q. You just don't have any recollection of that?

A. No. I don't. I don't believe the ambulance came right up into the scene at all, but I'm not sure.

Q. In any event you weren't worried about him pulling a gun on you, were you, sir?

A. At that moment, no.

Q. And to your satisfaction, you felt safe?

A. Yes.

Mr. Hughes: That all.

Mr. Mahoney: I have no further questions.

The Court: You'll be excused. Call your next witness.

• • •

(p. 248) (Recess taken)

The Court: Call your next witness, Mr. Gassaway.

Mr. Gassaway: Dr. George Kirkham.

The Court: Come forward and be sworn, please. Be seated please. I'm compelled to note that Mrs. Frank, you've apparently suffered some sort of injury. Do you know any doctors that you might be able to get some treatment from by any chance? Go ahead, counselor.

Mr. Gassaway: Thank you, Judge.

(p. 249) George Kirkham called as a witness, having first been duly sworn, testified as follows:

Direct Examination

By Mr. Gassaway:

Q. Would you state you full name for the court and jury, please, sir?

A. Yes, George Kirkham.

Q. And what is your present occupation, sir?

A. I'm an associate professor at the School of Criminology, Florida State University in Tallahassee, Florida.

Q. Are you a Criminologist, Doctor?

A. Yes. I'm a Criminologist and I also function as a police officer as part of an ongoing search I'm conducting into the field of law enforcement.

Q. And as a Criminologist, what is your particular area of expertise?

A. My particular area of expertise is law enforcement. I'm particularly concerned with police behavior in

emergency crisis situations and such subjects as the use of force this offers.

Q. As a Criminologist specializing in law enforcement, what aspect of policing has your research and teaching focused on?

(p. 250) A. Primarily on police behavior in what I call high stress situations, police behavior involving use of force, emergency response and handling of crisis situations and attempts to identify and formulate properly these procedures in respect to these kinds of conduct.

Q. Doctor, in addition to your formal education, having a Ph.D. and being a scientist or a criminologist, have you personally had some practical exposure to such subjects as felony-in-progress calls?

A. Yes, I have. For approximately 9 years now, in addition to my duties as a university criminologist and researcher, I have been involved in working as a police officer over these years in four different departments, most of the time spent in uniform patrol division in the departments, myself handling calls, handling emergencies, handling felony situations, and in the course of these 9 years as a criminologist-police officer, I've had occasion to handle a wide range of different situations, including force situations, felony apprehensions, and the likes.

Q. In addition, have you had the opportunity as a police officer as well as a Ph.D., to be involved and have knowledge, a practical knowledge and experience in arrest procedures and the proper use of police force?

A. Yes, I have. I have worked as a science criminologist. I've been involved in providing, working in the

area of arrest (p. 251) procedures and proper use of force and, also, as a police officer, I've had practical occasion to, to make arrests in many circumstances and use different degrees of force.

Q. Now, for example, so that we can kind of get down to the jury, as a police officer, have you ever had to point a loaded weapon at a felony suspect?

A. Yes, I have, on a number of occasions.

Q. Have you arrested both felons and misdemeanor suspects?

A. Yes, I have.

Q. Have you ever had to use physical force to overcome resistance to arrest?

A. Yes, I have. I think I've never had an occasion to use deadly force, but I've been on the verge of it several times, and had occasion to use lesser degrees of force, nightsticks, holds, and so forth, a number of times.

Q. So, in addition to your educational training, your doctoral training, and criminology training, you've got practical experience out there on the streets?

A. Yes, sir. I try to make ongoing—part of each week I'm now on the streets as a uniformed, do a tour of duty as a uniformed officer.

Q. Have you had occasion to train other officers in the proper police procedures with respect to the use of force and the handling of in-progress robbery calls?

A. Yes, I have. I've been involved as a trainer, worked with (p. 252) some, oh, I would say, some 50 different departments at the federal, state, and local levels

throughout the country, department training, directing training from the FBI at the federal level through state police forces, such as the Maine State Police, Virginia State Police, Florida Highway Patrol on down through large numbers of municipal and city departments.

Q. And that's teaching these officers how to handle these matters.

A. Yes.

Q. Have you published any materials relative to the use of force and other aspects of police procedure?

A. Yes, I have.

Q. Would you describe those to the jury, please?

A. Yes. In addition to being an author of a couple of books covering the law enforcement and a number of scientific articles that bear on the subject, I've also published some 20 training pamphlets, relating to properly handling of different kinds of situations, and these are used quite extensively under government grants throughout the country for the training of officers. In fact some of them are also used in other countries. Some of them, for example, are used in training the British Metropolitan Police at the Field Center in London.

Q. As a matter of fact, the Oklahoma City Police Department has (p. 253) some of your training manuals, don't they?

A. Yes. I wasn't aware of that until this morning, but I understand that they are using some of them.

Q. As a criminologist, have you received any professional honors or awards for your work in the field of law enforcement?

A. Yes, I have.

Q. Will you describe those, please?

A. Well, a variety of them. From memory, I received the second annual J. Edgar Hoover Award for outstanding contributions to law enforcement. I received the 26th annual Freedom's Foundation Valley Forge Award for contributions to the law enforcement profession, and a variety of awards from local civic and police organizations around the country.

Q. Now, you've been a little modest there. You've received the Optimist International Award for outstanding service in law enforcement, have you not, sir?

A. Yes.

Q. And you received an award of recognition for outstanding service to law enforcement nationwide, is that correct, sir?

A. Yes. From the Reserve Law Officers Association of America.

Q. And you received an award for outstanding contributions to law enforcement education in the American justice system, have you not, sir?

A. Yes, sir.

Q. And in fact a scholarship fund, FSU, Florida State University (p. 254) has been established in your name, is that correct?

A. Yes, that's correct.

Q. And you've received an award of appreciation and recognition of outstanding service on behalf of the municipal police in the State of Ohio, is that correct, sir?

A. I think in a variety of states, Ohio, Florida Association of Chiefs of Police, Metropolitan Police Department of Toronto, and a number of organizations like that.

Q. Perhaps I skipped over—where do you live, Dr. Kirkham?

A. I live in Tallahassee, Florida.

Q. And do you teach at the university?

A. Yes, I do. I'm an associate professor there on the faculty of the School of Criminology.

Q. Okay. Have you had some individual—I guess some of the awards that we talked about came from law enforcement organizations themselves, have they not?

A. Yes, they have.

Q. And has your work and your contribution to the field of law enforcement received public recognition in recent years through the mass media?

A. Yes.

Q. Tell the jury briefly about where you've been covered.

A. Well, briefly, CBS 60 Minutes with Dan Rather did a segment on me a few years ago. I've been on Good Morning America a couple of times, NBC's Tomorrow. Newsweek did a feature (p. 255) story on me a few years ago; Time, US News and World Report, Readers Digest, People, National Inquirer, a variety of different things around the country.

Q. Has your work in the field of law enforcement been publicized and your writings distributed among international police communities?

A. Yes. Some of my works as I mentioned on training are used by the British. Some of my works have been printed in other languages in other countries, ranging from law journals, law enforcement journals, for example, Interpaul, which serves the national police community has reproduced some of it, police journals in countries ranging from Germany, India, even the Soviet Union have reproduced one over the years.

Q. Dr. Kirkham, how old a man are you?

A. 40. Just turned 40.

Q. And are you a married man?

A. Yes. My wife is a detective, fulltime detective for the Calhoun County Sheriff's Department.

Q. Do you have children?

A. Lots. I have 4.

Q. And I believe you testified that you teach out at Florida State University. In what school are you a professor?

A. Well, I teach in the school of criminology at Florida State University primarily in the field of law enforcement. Most of these courses are related to police. Then, of course, I (p. 256) teach in training academies as requested by departments around the country.

Q. And at present, are you a fully-sworn police officer?

A. Yes. I am a regular, police-sworn officer. I work on a part-time basis, most of the time on the nature of my university research I do work, but I normally—as I say, sometimes during the summer I work fulltime, full-

time as a patrolman, sometimes also during holiday breaks, but during the normal year, I always manage to work at least a tour of duty a week, usually on the weekend.

Q. And have you appeared as an expert witness in courts of law before?

A. Yes, and I've functioned as a expert witness to date in about 30 states at the federal and state courts in cases involving, some 125 cases involving police officers, most of them centering on the use of police firearms, questions of excessive force, deadly force, and questions of proper or improper use of police force being reported.

Q. And are you exclusively—do you exclusively testify for plaintiffs?

A. No, no. I spend—it covers between, between 50 and 40% of my time testifying in behalf of police departments. For example, upon leaving here today, I go to Miami where I am taking, doing a deposition in relation to, on behalf of the police department with whom I'm working on a case.

(p. 257) Q. You have been a member of the Board of Directors of the Americans for Effective Law Enforcement, is that correct?

A. Yes, I was. And I was also recently elected Executive Director of the American Certification Board of the National Academy of Police Specialists.

Q. And you are a member of the Board of Directors of the International Law Enforcement Stress Association.

A. Yes, that correct.

Q. And you were the Director of the 1978 National Conference on Stress in Policing, is that correct?

A. Yes, that's true.

Q. And have you served as an instructor, lecturer, or consultant for the New York City Police Department?

A. Yes.

Q. NBC News?

A. Yes.

Q. Detroit Police Officers Association?

A. Yes.

Q. Philadelphia Police Department?

A. Yes.

Q. Pennsylvania State Police?

A. Yes.

Q. Virginia State Police?

A. Yes.

Q. Maine State Police?

(p. 258) A. Right.

Q. Yonkers New York Police Department?

A. Right.

Q. The Police Officers Association of Michigan?

A. Yes.

Q. The Albuquerque, New Mexico Police Department?

A. Yes.

Q. Cincinnati, Ohio Police Department?

A. Yes.

Q. The Dayton, Ohio, Police Department?

A. Yes.

Q. Roanoke, Virginia, Sheriff's Department?

A. Yes.

Q. The Metropolitan Police Department of Toronto, Canada?

A. Yes.

Q. You served as an instructor at the United States Military Police Training Center, Fort McCalla, Alabama?

A. Yes.

Q. And you served at the United States Treasury Department at the Consolidated Federal Law Enforcement Training Center?

A. Yes.

Q. And for the FBI?

A. Yes.

Q. At Quantico, is that right?

A. That's right.

(p. 259) Q. And you served as a consultant to the Northwestern Traffic Institute?

A. Yes.

Q. And North Carolina Law Enforcement Officers Association?

A. Yes.

Q. Florida Sheriffs Association?

A. Yes.

Q. State of Indiana Fraternal Order of Police Association?

A. Yes.

Q. And it could go on and on, can it not, sir?

A. Yes.

Q. I've got a list here of probably 20 more departments?

A. Yes, a number of, quite a number of departments.

Q. And have you worked as a Research Criminologist in the Systems Analyses Division of the Stanford Research Institute?

A. Yes, I have.

Q. And have you been the Project Director of Research Associates for the Center of Interdisciplinary Studies at the California State University?

A. Yes, I have.

Q. And have you been the Consulting Editor for the Journal of Police Science and Administration?

A. Yes.

Q. And you have been the Editorial Consultant for Harper and Rowe Publishers in Police Science, is that correct?

(p. 260). A. That's true.

Q. And that list could go on and on, too, could it not, sir?

A. Yes.

Q. And some of your educational films dealt specifically with police civil liability and negligent operations by police officers, is that correct?

A. Yes. It's a series of six films that cover the spectrum of police civil liability, and among others, things that address arrest, improper use of deadly force, intentional negligent use of firearms and excessive force generally.

Q. And you've had several books published also I believe you said, is that correct?

A. I have two books in print at the present time, yes.

Q. And you've been published in legal journals, including the Barrister, which is the National Law Journal, is that correct?

A. Yes, that's correct.

Q. And you've received research grants, is that right?

A. Yes, I have.

Q. Specifically in training municipal police in relation to emotional control skills?

A. Yes.

Q. And training correction personnel in stress management techniques?

A. Yes, that's correct.

Q. And you've received many academic honors also, is that (p. 261) correct? I don't need to go through all that.

A. Yes.

Q. Have you had an opportunity to examine certain materials in reference to this case that you're here in court about today?

A. Yes, I have.

Q. Would you describe the materials that have been provided to you?

A. Yes. A variety of materials pertaining to the shooting occurrence on the night in question, depositions of Officer Rotramel, I believe, other police officers responding to the scene, detectives, general police reports, rules and regulations of the Oklahoma City Police Department, medical examiner report, diagrams, photographs. I've also had an opportunity with yourself to go to the scene last evening, something I always try to do in any case I become involved in. So, generally those are the things that come to mind.

Mr. Gassaway: May I approach this witness, your Honor?

Q. Dr. Kirkham, I'll hand you what's been marked for identification purposes, plaintiff's Exhibit No. 8 and ask you if you've had an opportunities to review that document?

A. Yes, I have.

Q. And what is that document, sir?

A. This document is in my understanding a copy of the training curriculum that was in effect at the time Officer Rotramel (p. 262) went through the Police Academy.

Q. Okay. And you have had a chance to review specifically 9.03 of the Oklahoma City Police Department Operations' Manual, is that correct?

A. Yes, I have.

Q. And 17.05?

A. Yes.

Q. And of the particular pages that we feel are important in this case?

A. Yes.

Mr. Gassaway: Move to admit plaintiff's Exhibit No. 8, Your Honor.

The Court: Without objection, will be admitted.

Q. Shall I call you doctor or officer?

A. You can call me, George, if you like, doesn't matter.

Q. You've also had the opportunity to examine the exhibits that have been introduced in the trial here today?

A. Yes, sir, I have.

Q. Including actual photographs of the scene as it was depicted on October 4, 1980, the date William Adam Tuttle met his death?

A. Yes, that's correct.

Q. On the basis of your analysis, have you been able to formulate an opinion as to the extent in which Officer Rotramel's conduct on the night in question conformed to (p. 263) well-established police procedures and the principles of police conduct?

A. Yes.

Q. And what is that opinion, sir?

A. My opinion is, and I believe I can best express it this way, that in probably between 40 to 45 shooting cases that I've been involved in, this is the worst departure from acceptable, universal in this country, standards of police conduct relating to the use of deadly force, worst case I've ever seen or been involved in.

Q. Did the conduct arise to, of the defendants arise to gross negligence?

A. Easily to gross negligence.

Q. Did it rise beyond gross negligence in your opinion?

A. Far beyond the scale of gross negligence, quite frankly, and in reading the documents, why my first question was, wondering what had happened from the criminal standpoint because the conduct was shocking.

Q. What is the basis for your opinion and conclusions?

A. That, very briefly, that there was no, and I would emphasize it as a police officer, preparing police officers, trainer of police officers, I would go to the inth degree to see an officer's side of things, but even doing that, in laying down the evidence which I have tried to do, there was no, there was no remote justification for shooting this man in terms of (p. 264) proper police procedure. There was no — first, there was no, no good faith belief, could not possibly have been a shadow of any belief that a felony had occurred, robbery in this case,

at the point at which he shot him, and that this man had perpetrated a robbery. There was no remote basis for believing that this man was a threat to Officer Rotramel or anyone else at the moment in which he was shot. And finally, going all the way back as far as we've had law enforcement officers, there's always been the expectation within the most moving shooting situations that an officer is expected to be reminded of this good regulation that an officer would first exhaust, attempt to exhaust at least lesser means with respect to the use of force, but here I see no evidence of any exhaustion of lesser means. As I say, it's just — it's almost an unbelievable shooting occurrence. I have no wish to add to the mental anguish of the officer. I'm sure he feels generally bad about what happened, but it's a terrible, terrible occurrence and one that I think was preventable through proper training and supervision.

Q. Let me ask you that, in your opinion what was the cause of Officer Rotramel's violation of well-established principles of police conduct on October the 4th, 1980, which resulted in the death of William Adam Tuttle.

A. Well, there was a series of departures, so many departures from well-established principles of police conduct that it (p. 265) came to me, inevitably, the conclusion that the officer was not properly trained, was not able to handle that kind of call, that kind of occurrence on his own. For example, I can speak to some of these things if you like — the way in which the call was handled. It is as basic as putting on shoes in the morning to come here to a police officer, that a felony in-progress call is never dealt with by, by one officer when there's back-up units available, where there are back-up units available. And from my reading of Officer Rotramel's deposition, he seemed to

be unaware of this fact. If indeed had there been a robbery in progress, he would have been a prime candidate to become an officer fatality statistic. He merely walked into the situation, did not wait for the back-up units en route to him. There was no car-to-car coordination, communication. He pulled up directly in front of the place. These are all things that are in a tight, troublesome locations, training locations that are to be emphasized and re-emphasized. He plainly did not understand these things.

Q. Doctor —

A. And —

Q. Dr. Kirkham —

A. Yes.

Q. If Officer Rotramel was not trained to wait for a backup and was not trained in how to handle a blind building situation, (p. 266) would you, based upon the examination of all the materials that you've had, find that the training was grossly inadequate and so reckless that police misconduct was inevitable?

A. Yes, I would say so. He was not trained in certainly the three "R"'s, which are very basic essentials of police conduct. You don't put someone out on the street with the power of police officer responsibilities, not being certain they understand, basically, some things should be left to experience, even trial and error, but not the handling of a felony situation, a robbery in progress. And, again, there's a very well laid out curriculum that is used through out the country for this kind of thing, and even a review of the existing training curriculum of the department at the time, I note that there was only 24 min-

utes devoted to robbery in progress calls, and these are statistically one of the most dangerous calls that an officer has to handle. Obviously this material was handled in a slipshod, hurried fashion. While the department's rules and regulations concerning the use of deadly force are good and sound and consistent with ones established around the country, there is a need to, to go beyond this in making officers practically aware of how you handle different types of situations. Now granted the fact that you can't prepare a person for every, every robbery, every burglary, every car accident, but you prepare (p. 267) them in terms of general principles so they know what to do and what not to do and this young man obviously was not prepared adequately and was not able to function on his own.

Q. Now you mentioned some of the curriculum of the robbery scene response being 24 minutes according to the curriculum as originally introduced in one of our exhibits, is that correct?

A. Yes.

Q. And the curriculum indicated that they had firing ranges training of 80 hours, is that correct, sir?

A. Yes. And of course it's fine for officers to know the, and important for them to know the mechanics of firearms use, but it's also important for them to understand from the practical standpoint, the circumstances in which one uses firearms, in which one prepares to use firearms, and these things apparently were not gotten across. The — I note that apparently, I see in Officer Rotramel's deposition, they used two very excellent training films that are used widely around the country, "Shoot, Don't Shoot," Parts 1 and 2, but that's not enough. And no police

department that I'm aware of simply shows these two films which present different types of shooting situations. At least at that there's a need for supplementary instruction. There were so many things that were, that were departures from accepted police procedure, going in by himself when he had backups coming, parking (p. 268) directly in front of the building —

Q. Now did you find from his sworn statement that Officer Rotramel testified that he parked his police vehicle directly in front of the front door?

Mr. Gassaway. May I approach the witness, Your Honor?

Q. Referring your attention to a very rough drawing behind you, Dr. Kirkham, this being the front door, (indicating on drawing) north, west, east and south, this being the front door of the Will Do Club. He parked his vehicle directly in front of the door. What, if anything, do you find improper about it?

A. Again, are many, many standard works that address this. Virtually everywhere around the country it is taught to my knowledge that an officer, first you never stand in front of a door where you have a possibly dangerous call. Even a domestic disturbance can be dangerous. And, secondly, you never, never pull a police vehicle directly in front of one for the simple reason that you don't want to telegraph your approach to the call that could be, in this case, an armed robbery in progress. You want to approach at a side angle. You want to do a surveillance of what exits there are, where are they located, are there any windows you can see in and what would be called-for procedure in a situation for the officers to set up or the most

likely escape route? In this (p. 269) case it may be adjudged to be the front door that the person is most likely to come out of. You set up at a safe distance from there, against trying not to telegraph his approach and coordinate over the radio with other units, saying I'm covering the location, and I'm covering the east end, and one possibly covering the west and when you've got the place secured, then you would approach in a force, with a tour in force, a number of officers. Studies have shown that the probability of resistance of an armed suspect, had this been an armed robbery, is directly proportionate to the police manpower on the scene. In other words, the less the manpower, the more likely this would be a shooting situation, the less likely that the personal will surrender. So, there are quite a number of departures from sound, established police practice. I think clearly they go to training and supervisory deficiencies.

Q. Let me ask you this, Officer Rotramel testified that he did not look for alternative entrances or exits. What, if anything, do you find improper about that?

A. Well, it was a departure from established police procedures in that he did not do that, uh, increased the danger to him in terms of — there could have been, for example, if you don't — if you check out an area closely, there may be a better route of entrance. There may be some aperture or opening or window by chance in a blind building, something (p. 270) you could see in. There could be a lay-off man waiting in another car, parked at the side who was going to shoot you when you walked up if you're not paying any attention to what's going on around you. So, officers are trained to, to take in the whole situation and not, above all, not to jump the gun, not

to rush in, in this — indeed, I have found in my studies of officers shooting people and officers being shot, that the common denominator is jumping, jumping a call, or jumping into a situation without, without waiting. I think intelligent policemen are, are supposed to be, take charge, don't rush into things, and try to train them, condition them to realize not to do that, slow down, wait for the backup, find out what's going on, and we try to train them out of this kind of response.

Q. Now, Officer Rotramel testified that he did not have any training on how to secure, or handle a blind building situation, blind building being the front door shut, no means of looking inside of the building. If he did not receive any training, would you find that to be grossly inadequate?

A. Yes. He should have received specific training on the approach to buildings with possible felonies in progress. This would cover not only robberies, but burglaries as well, how to, how to set up on a building, how to position himself, the question of waiting for backup. There is clear indication from his deposition he does not recall any (p. 271) specific instructions, and that would be a glaring departure if you are — in fairness to the department, I've looked at their curriculum trying to see where this kind of material might have been covered. Sometimes it dealt with under patrol procedures, but in the breakout of the, the hours, I don't see where they, where they covered this material. And it's extremely basic and I'm astonished because there is, the policies are good policies.

Q. Now, Officer Rotramel testified that he wasn't trained to go into a situation with a gun drawn when he was responding to a call of an armed robbery in progress. Do you find that this lack of training would be so grossly negligent or reckless, reckless so that policemen misconduct or shooting would be the inevitable consequence there?

A. Yes. In an officer's response to a felony-in-progress situation, there's always discretion in terms of, to some degree in how an officer handles a situation, every situation being different. But an officer, for an officer to approach the situation like this, first, without backup is bad and, secondly, to approach it without a drawn weapon — I can't conceive approaching a robbery-in-progress call without, without have a a weapon drawn or in a ready-to-draw position, or ready to walk, walk into a place. There are, there are specific techniques of entrance where you think you have a in-progress call — I won't get into the mechanics—(p. 272) but they're taught commonly in training curriculum.

Q. Now, you are aware, are you not, that at the time of the shooting of William Adam Tuttle in the back, Officer Rotramel had been out of the Academy approximately 10 months?

A. Yes.

Q. And testimony from Captain Delaughter, who was the patrolman, who was the acting chief of police on the night of the incident, indicated that although an officer is on a probationary period for one year after he's out of the academy, the shift commander can, at his discretion allow him to ride without a supervisor after four,

five or six months, but there wasn't any checklist of any sort to check him off to make sure that he's competent to do that. What, if anything, do you find improper about that?

A. Yes. There should have been within the department — again this is used quite widely in departments of this size throughout the country — what is called the "FTO," program, or the "Field Training Officer" program that is, that is well structured. Basically what it involves is you take a young man or woman who is going to be a police officer who has been carefully selected, we hope, and you just don't let them ride with someone, you put them with people who are, based on past conduct and experience, are the best trainers that you've got, and you have those officers — the senior officers are called FTO's or field training officers—function as it (p. 273) were as supervisors of those people in charge and check them off, on everything from soup to nuts, check them off on response to a progress-type call, prowler calls. If you see the officer doing something, you say, Charles, don't stand in front of the door, don't park your vehicle like this, let's go back. Let's try this. Let's do this. You check them off on all these kinds of critical areas, and then at the end of a — it's common, for example, for this FTO period to be six months and for a person to be cycled through several different FTO supervisors, so they get a smattering of different perspectives — but at the end of this period of time, then and only when it's clear they're signed off on of all of these things, that are the practical side of what they formally learned at the acadeamy — there being no substitute for practical

experience — then they're allowed to go on their own. And if their response is apparently someone is not up to snuff in some areas, they're having trouble with car stops or something else, you don't put that person out on their own because something could happen to them. They can be injured. They can be killed. They can make serious mistakes in the field of the sort that we see here.

Q. Based upon your examination of all the sworn statements of the police officers, and depositions of the police officers, and the depositions of the witnesses, Vonnie Hinds and Beverly Hayes, did you find that defendant Rotramel on the (p. 274) night of October 4, 1980, to the best of his ability, tried to make the arrest of William Adam Tuttle without violence?

A. No.

Q. Okay. Did you find that there were means, other means of apprehension exhausted prior to the shooting of William Adam Tuttle in the back?

A. No, there weren't. Again this goes to another, another deficiency here. I recall in Officer Rotramel's deposition where it was posed to him, what, you know, could you have done something else if someone was attacking, and the only thing he could think of was maybe he could have hit him with a flashlight. There are many things. You had backup units coming in. There's the possibility of foot pursuit. You've got radio communication with other officers who could be beneficial in, you know, other positions in an attempt to apprehend him. There are all kinds of things and judging by what I understand to be the shooting range and the position in which he was shot at the time the officer stepped out of

the bar, there was just no remote exhaustion of those means, exhausting of other means.

Q. And William Adam Tuttle was not a fleeing felon on that night, was he?

A No, nor could I think any police officer reasonably would believe that he was.

Q. And could you categorize him as a misdemeanant?

(p. 275) A. Yes. He was in my understanding of the municipal ordinance, he was someone who, who had violated a municipal ordinance of refusing to obey the lawful command of a police officer and making a false report but, you know, again when a police officer, even if you allow this was, initially went out as a very bad call, a robbery-in-progress call, when a police officer, when you have had an occasion to enter an establishment, when you enter a place under suspicious circumstances like this, setting aside the content of what the barmaid told the officer that everything was okay in here, you can tell from the, the expression of people, the behavior of the people that there's something wrong here, as the case of the, the person who comes to the door and they say, yes, officer, everything's all right. You can see all over their face they are tense, they are frightened, maybe someone has a gun on them, but in these circumstances, there were 6 to 10 patrons in there going about their thing. This man had a drink. There's no way, there's no way in my wildest thought, imagination that an officer could believe upon seeing that and hearing what the barmaid said that there was anything amiss in there in terms of a felony.

Q. Do you also take into consideration that the decedent had a drink in his hand when he came up to the officer?

A. Had a drink in his hand as well.

Q. Is that in any way consistent with being an armed robbery (p. 276) suspect?

A. No, that, that would not be consistent with suspicious behavior on the part of an armed robbery suspect.

Q. In all of your travels, and all of your consulting, and teaching, and publishing, and appearances and testimony is there anywhere in the world that you know of that a police officer is justified for shooting a misdemeanant?

A. No. It goes all the way back to common law that a police officer is never justified in taking the life of a misdemeanant. Once a person becomes a felon, that is to say, someone who is a misdemeanant doing something in a bar, committing simple assault and suddenly grabs a, a gun or knife and pulls it out, transforms itself into a felony. So there's no—shooting of a misdemeanant is universally prohibited, and indeed is declarative in the policies.

Q. Now you are aware that Officer Rotramel testified that the decedent, although it's been contradicted, that the decedent made a move to his boot although he never pulled his pant leg up, you are aware of that?

A. Yes. I'm aware of the allegation he made a couple of different movements toward his boot.

Q. Based upon that and based upon the fact that Officer Rotramel never saw an offensive weapon, real, fake, or otherwise, would he have been justified in using deadly force as a last resort situation at that point?

(p. 277) A. No, not at all. At that range, and then I've had occasions to have firearms on people at least

three cases I can think of, ready to fire situations, at that range with a man's back to me at 8, 10 feet, it wouldn't matter how tense I was or if he was wider, with a revolver, in a ready-to-fire, raised position, there is absolutely no way that he could come out of there. If he could get his pant leg up over his boot and reach down, there is no way that he could come up with a weapon and point that weapon where I couldn't shoot him, amply shoot him before he had an opportunity to turn. I could shoot him several times. Any police officer could. So, there was, as I say, there was no remote threat and of course there was no weapon seen.

Q. Now, Officer Rotramel testified to this following:

"Question: You can't shoot a man that's running from you when you haven't seen an offensive weapon, can you?

Answer: No.

Question: An offensive weapon could be a gun, a knife, perhaps a multitude of other things that cause bodily injury or death, is that correct?

Answer: Yes.

Did you see an offensive weapon in the attempted apprehension of William Adam Tuttle on the 4th (p. 278) day of October, 1980, at a location at approximately Northwest Tenth and Portland outside the Will Do Club?

Answer: No.

And you shot William Adam Tuttle that night, did you not?

Answer: Yes, I did.

In your capacity as a police officer?

Answer: Yes."

Is a shooting justified in any circumstances that we have here, any remote circumstance, if you have not seen the weapon?

A. No. If we know that there is no present ability to apparently harm anyone, there's no immediate threat of death or any bodily injury to anyone, there's no remote belief that a felony exists and there's no reason to believe that a felony exists, what you've got is a shooting of a misdemeanant, someone fleeing from a command to halt, someone inadvertently or strangely, or whatever but, good lord, that's no basis for shooting him.

Q. Now, the defense in this case is that William Adam Tuttle was trying to get the police officer to kill him, that it was a suicide. Did any of the statements, sworn depositions, or any other material you have indicate that the deceased baited the officer in any way into shooting him?

(p. 279) A. No. The decedent did nothing in this circumstance that would justify the officer's shooting him. Now, there are well-documented cases, and I've seen a number of them along as a police officer, in research about people who are subdimensionally suicidal, again, the number going to see a psychiatrist. I'm not one, but there are people who engage in self-destructive kinds of conduct, but even if one hypothesizes that was this man's, in his disturbed—

Q. Let me stop you there. Let me stop you there. Let's assume, just for the sake of arguendo, that William Adam Tuttle was trying his best to get killed by the police officer and he was doing his best to get killed, but we have the same fact situation at most, we have movement to the boot for a gun with no pants' leg coming up, no reaching into a boot, no visibility of a weapon, would that officer be justified in shooting that man even if he was trying to commit suicide?

A. No. No. And of course the police have, a police officer—they frequently deal with people who are mentally disturbed or self-destructive, and they are under an obligation not to, not to facilitate their self-destruction, so there would be nothing, there would be no justification for, for shooting under those circumstances. Now the, if a man—and I have, you know, have had cases where—anytime a police officer sees a gun, somebody pulls a gun, begins to move on him—I'm on the other side of the table when he does. If the, the (p. 280) police officer reasonably believes for a moment that his life or the life of another person is in danger, my response to them is to shoot and protect yourself at all cost. But we're not dealing with that kind of situation or any remote fraction of it.

Q. He didn't see a weapon, did he?

A. He did not see a weapon.

Q. There's no way of any reason, method, or otherwise that you would justify the shooting, is that correct?

A. That's quite correct.

Q. Now, Officer Rotramel testified that he was not adequately trained to handle the situation he got himself into. Would you agree with that?

A. I'm afraid that's the truth. I'm afraid he was not—he was in over his head. He was a young man, inex-

perienced, and not properly trained, and did not have proper supervision in the past. You have the chemistry of that and this poor man coming together that lead to this event.

Q. Should the officer have yelled, "halt," or, "stop," or, "you're under arrest," before he ever drew down on that man if he had not seen that weapon?

A. Well, the officer should have after, after seeing the weapon, he should have either issued a command or a series of commands to halt, stop.

Q. Loud enough for everyone to hear?

(p. 281) A. Oh, yeah. I mean, it's not uncommon for a police officer, as a police officer, to use that when shoplifters are running, and an officer simply shouts and has no intention of even drawing a gun or shooting, but shouting at a person, "stop, or I'll shoot," to get them to stop. So in these circumstances, the officer certainly should have done that, but in my reading of the facts, there was no, he really did not exhaust any of these kind of means he could have used to try to effect this apprehension.

Q. Does a police officer have a right to shoot a potential felon?

A. No.

Q. Now, the officer testified that he saw, while he was standing, that the bartender, and Officer Rotramel, and the dead man were standing there by the door, that the, that William Adam Tuttle made two moves for his boot. What should a police officer do if in fact the police officer had any suspicions there was a weapon on the man at the time?

A. He — yes — nothing — that's inconsistent in the search of my mind in the reading of the facts. As a police officer, any time you're in a suspicious situation, possible felony situation you believe might be, you've got someone reaching for a boot, or a bag, or something like that you think could contain a weapon, there's only one universal response, and that is, you draw them out. You place them on the wall, and (p. 282) you make darn sure what's in that, what's in that boot and that bag for your own protection, and so, if you believe that, that's what you do. You don't ignore it. It would be foolhardy to do that.

Q. Okay. Now, Officer Rotramel stated that it would be more probable than not that if he had been adequately trained, William Adam Tuttle wouldn't have been shot. He would be alive today. Do you agree with that?

A. I think that's true. If he had been properly trained and supervised, the occurrence would not have taken place.

Q. And could he have been adequately trained for that situation?

A. Yes. Could have been, should have been.

Q. Should he have been taught differently as to how to respond to an armed robbery in progress working it as a single as opposed to working it as a partner?

A. Yes.

Q. Should he have been taught how to proceed into a blind building?

A. Yes. He should have been.

Q. Should he have had training in securing a blind building?

A. Yes.

Q. Should he have had training on when to wait for a backup in responding to a call of this particular nature?

A. Yes. All those things.

Q. Based upon your examination of the statements in this case, (p. 283) should he have had a supervisor riding with him?

A. He should not have been in a solo car, based on everything we've seen and his lack of understanding on how to handle these things, because an officer riding by himself at any moment might bump into just this kind of situation. You don't, you don't take their training wheels off until you are sure they can handle the full range of things as they come up.

Q. Now, you are aware, are you not, that Officer Rotramel testified that after the shooting, a memo was passed around with the headline on it "Oklahoma City Police Officer versus William Adam Tuttle—we aim to please."

Mr. Mahoney: Objection.

The Court: Sustained. Counsel, there's been no evidence to that effect in this case.

Mr. Gassaway: All right. I'll get into that at a later time, Your Honor.

Q. I believe you've gone over the curriculum, and I believe you've testified that there was about 80 hours of firing range practice.

A. Yes.

Q. And did we find that there was over 50 hours in physical education?

A. Yes, I think there was.

Q. And over 40 hours in public relations in urban communities?

(p. 284) A. Yes.

Q. And 40 hours in first-aid?

A. That's what I recall.

Q. Thirty-six hours in criminal law and penal code?

A. Yes.

Q. And 34 hours in psychology of personal adjustment?

A. Yes.

Q. Thirty hours in report writing?

A. Correct.

Q. Thirty hours of auto accident investigation?

A. Yes.

Q. And 20 hours of traffic ordinances?

A. Yes.

Q. Fourteen hours of military drills?

A. Yes.

Q. And 13 hours in hand-to-hand, self-defense type courses?

A. Correct.

Q. Ten hours of minority relations?

A. Yes.

Q. Eight hours of in city geography?

A. Yes.

Q. Six hours in the history of law enforcement?

A. Yes.

Q. And on down the line as it goes down, and we found one portion of one course entitled "robbery scene response?"

(p. 285) A. That's correct.

Q. And that was a two-hour course, divided into five different subjects, is that right?

A. Yes.

Q. Assuming that "robbery scene response" got an equal amount of time as the other four, would that not be a total of 24 minutes training in robbery scene response?

A. It would be a very, very small fraction.

Mr. Gassaway: May I have one moment, please?

Q. Purely for explanation purposes, would you explain to the jury the difference between a felony and misdemeanor?

A. Yes. A felony is—it is a crime, very specific crime involving a great magnitude involving a serious misconduct. Normally it is punishable by imprisonment for a period exceeding a period of a year and beyond, and a misdemeanor is a minor transgression, something that does not warrant the kind of, the kind of response to the action a felony does. So that there is a difference in magnitude between the two crimes.

Q. And would a misdemeanor merit execution?

A. No. A misdemeanor never, never, warrants the use of deadly force regardless of the nature of the misdemeanor.

Q. And would execution be an adequate or adept term in categorizing William Adam Tuttle's death?

A. It's a horrible term to use but sadly this case falls in that (p. 286) kind of category because it comes in that curbside kind summary judgment, curbside execution of someone who had committed a misdemeanor.

Mr. Gassaway: That's all.

The Court: Mr. Mahoney.

Cross-Examination

By Mr. Mahoney:

Q. Dr. Kirkham, you were talking about all the police departments that you worked with or had association with. Have you had association with the Oklahoma City Police Department?

A. No, sir. I never have.

Q. Are you familiar with any of their training activities?

A. I've not been to their academy. I've only had a chance to review their training curriculum. I understand they use some of my training materials, but I'm not familiar even with the police academy.

Q. Have you spoken with the instructors out there?

A. No, I have not.

Q. Have you spoken with anyone connected with the academy in the training division?

A. No.

Q. The only thing you've seen connected with the Oklahoma City Training Department is that curriculum in front of you?

A. That is correct.

(p. 287) Q. And based on that, you're willing to condemn the complete training facility of the Oklahoma City training?

A. No, I'm not trying to condemn the academy training as a whole. I'm saying that based on the officer's conduct and my reading of the curriculum, that there has to be a connection between the two in my mind based on what the officer did. There are deficiencies apparently in the curriculum, maybe fine in the ultimate respect.

Q. Are you aware of any other instances other than the one involving Julian Rotramel with the Oklahoma City Police Department?

A. Any other shooting instances?

Q. Yes.

A. No, I'm not.

Q. So based on one shooting incident, you believe the training is faulty?

A. I believe the training in these areas based on on what we've said here today is grossly deficient.

Q. On that single shooting?

A. On the basis of the single shooting, yes. I think it's a major hole.

Q. Dr. Kirkham, are you aware of the state requirements for police training of police officers in Oklahoma?

A. I'm aware that it varies from state to state. I'm not aware specifically of how many hours Oklahoma requires as a state (p. 288) right now.

Q. Do you know how many hours of training that the Oklahoma City Police Department trains their recruits?

A. I'm not aware of the total number of hours.

Q. All right. If I were to tell you the total number was 700 hours, would that seem sufficient compared to other training academies?

A. If the, if the total training time is 700 hours, I'd say it is a good number and one consistent with probably departments of this size, though that doesn't speak to the content of what's being taught.

Q. Are you familiar with Tom Hagee by reputation or do you know him?

A. I'm sorry, with whom?

Q. Tom Hagee?

A. I do recognize the name. I can't place it.

Q. All right. Now, Dr. Kirkham, which depositions were you supplied with for your developing your opinion here?

A. Well, I don't have a list of them with me, but the deposition of Officer Rotramel, of course, deposition of witnesses, Mrs. Hinds, other witnesses, police officers re-

sponding to the scene, the investigators who were involved, quite a number of police depositions. I'd have to have my list here to be able to enumerate.

Q. Okay. Were you given any depositions in their entirety?

(p. 289) A. Yes, I believe so.

Q. Did you read the deposition of Officer Rotramel in its entirety?

A. Yes, I did.

Q. Do you recall anything in that deposition of Officer Rotramel telling the suspect to stop?

A. I recall Officer Rotramel making, using the expression hollered, saying something about hollered, but I'm also aware from reading of the depositions of other principals that they heard no such command, so I think it's a mute point as to what happened there.

Q. All right. I believe in direct you stated that sometimes in a armed robbery situation, a witness may say one thing but the expression on their face may tell you another, is that correct?

A. Yes, as I pointed out, it was one of the things to look for in dealing with anyone as a police officer.

Q. Okay. Now is this a subjective evaluation, or can an officer be trained to learn the expressions of people?

A. Well, you train officers, we train officers specifically to learn what we call body language, to look at a person's face and bodily mannerisms to see if it's consistent with what they're telling you. A person may be, lying, for example, at a traffic stop, tell you it's their car,

but their face is, they're tense or frightened, and you learn to (p. 290) read peoples' faces in a sense.

Q. If someone, if Officer Rotramel in this situation asked the bartender if there was a robbery going on and she told him there was not, could her expression indicate something different?

A. Her expression would have to be one thing to be considered. Obviously if she looked terrified, and she was standing in a position where someone could, could have a weapon on her, for example. But the other thing here is the atmosphere of the bar itself where you've got a number of people in there, either drinking or going about their business; you just, you just could not conceivably believe there was a robbery-in-progress stage. When you put all of this together the officer could not—

Q. Okay. Dr. Kirkham, are you aware that Vonnie Hinds was the bartender?

A. I believe that was the name.

Q. Are you aware that in Oklahoma she is required to have a bar card to work in a bar?

A. Yes.

Q. Were you aware that it was expired when the officer came in?

A. I recall it being expired at that time.

Q. Were you aware that she thought that Officer Rotramel was coming in to check her bar card?

A. I recall a statement to that effect, that she asked someone (p. 291) else to step back.

Q. Now, could this change her expression or demeanor in response to the way Officer Rotramel could interpret her response?

A. Well, there is a difference between a person who does not want to see the police there in terms of like a motorist that is speeding and someone telling him to stop or something, and a person who—I have seen a look of terror on someone's face who's been, been threatened by a violent crime. It's a different kind of thing in view of the evidence of the officer, even an experienced officer, properly trained, that—

Q. An officer could tell if something was amiss though, couldn't they, might be able to tell?

A. Well, the officer I think would have gotten the impression from Mrs. Hinds that perhaps she was not happy about his presence there, but there would not be any of the appearance or mannerisms that one would associate with a felony in progress.

Q. This would be a subjective evaluation of the officer?

A. This is a subjective evaluation.

Q. There's no way that anyone could tell exactly what an officer could interpret today, twenty months later, could they?

A. No. You just provide the general diagram and things to look for, the atmosphere of the place, facial expressions and so on.

(p. 292) Q. All right. And Dr. Kirkham, have you ever found any suspects with weapons hidden in their boots?

A. I have, yeah. I have had occasion to, on frisks and searching people, to recover weapons from a variety of places.

Q. Would you consider that an unusual place to hide a gun?

A. No. A boot, ankle holster or boots are commonly used for, for weapons and, of course, we caution officers to, to that point.

Q. And you are aware that Officer Rotramel had a suspect, had a description of the armed robber, white male, brown hair and glasses?

A. Tinted glasses, yes.

Q. You're aware that Julian Rotramel was a white male with brown hair wearing tinted glasses?

A. I think you mean—

Q. Excuse me, I mean William Adam Tuttle, the decedent.

A. I'm aware that Mr. Tuttle approximately matched the description.

Q. You're aware that Mr. Tuttle approached Officer Rotramel?

A. I'm aware of that with a drink in his hand, yes.

Q. With a drink in his hand?

A. My understanding is that he had a drink when he walked across the bar.

Q. All right. He had a drink and put it down and approached Officer Rotramel with no drink in his hand?

(p. 293) A. Well, at some point and time the drink may have been, may have been put down, but the point sticks in my mind is that he initially had a drink in his hand as he approached or was called by the officer.

Q. All right. And Officer Rotramel told William Adam Tuttle to stay in the club, are you aware of that?

A. I'm aware of that, yes.

Q. You're aware that William Tuttle made two movements toward his feet inside the club while the officer was investigating the armed robbery report?

Mr. Gassaway: If the court please, I will object to the form of the question. That's Rotramel's version, not in effect what actually happened.

The Court: Overruled. He may answer.

A. I'm sorry. Would you please repeat that question?

Q. You're aware that William Adam Tuttle made two movements towards his feet while Officer Rotramel was trying to investigate the armed robbery?

A. Yes, I'm aware of that.

Q. You're aware that William Adam Tuttle darted out the door before Officer Rotramel told him he could leave?

A. It's not quite clear if he darted or ran, but he left the place abruptly, yes.

Q. And Officer Rotramel said he told him to stop at that moment?

A. Again, I, we seem to have some inconsistency in what people (p. 294) recall having occurred. I'm aware

that Officer Rotramel says that he hollered. I'm not clear just what he hollered, but he hollered something.

Q. All right. And then when he went outside the door, he told him to stop again, and William Adam Tuttle was down by his feet, reaching for something by his feet.

A. I'm aware that Officer Rotramel said Mr. Tuttle again made a reaching-type motion down toward his boot outside the establishment.

Q. And Officer Rotramel told him to stop at that point?

A. I can't recall what, if anything, Officer Rotramel said at that specific point. Again I have this recollection of him saying that he hollered, but that this, about this point and time, when the man's back was to him, he shot him at a very close range which looked to me about 8 or 10 feet.

Q. Are you aware that he shot after the decedent had jumped after he was told to stop?

A. He hadn't jumped but there was no evidence of a weapon with his back to the officer with a drawn weapon.

Q. You're saying that based on those facts that I've given you, that there's no remote possibility that Officer Rotramel could possibly believe that that fellow had a gun in his boot?

A. Same thing. I'm saying that there was—I'm not saying that. I'm saying that there's no remote justification for shooting (p. 295) under those circumstances. A man reaching for his, his boot—to give the officer the benefit of the doubt—he also could suppose, reasonably

suppose he's got something down there. Maybe he's got drugs he wants to get rid of or he's going for a weapon. Even assuming the latter, given the officer's position, given the things that he has seen and heard, there's just, you just don't kill someone over that.

Q. So, it's your testimony that Officer Rotramel had to wait to see a weapon before he could shoot?

A. In this circumstance I'm saying the officer should not have shot unless the man came up with—he saw the glint of a weapon, the handle of a weapon. I—you know, it would be a totally different situation, but he didn't see it. And in this kind of situation, as I say, all the direction of the officer's safety, there's no way—the officer could have shot easily if a person had come up with something, or attempted, because the man had his back to him, he would have had to get his pant leg up, get it out, it would become evident to the officer who could fire, had ample opportunity to fire with a drawn and steady weapon at that range, he would not aim—without any difficulty from there. The officer had the edge is what I'm saying.

Q. Did he have to wait until he saw the gun before, did he have to wait to see a weapon before he could shoot?

A. In this circumstance, yes, because there was no, there was (p. 296) no, no felony, no justification for shooting but the officer's fear of his own personal safety as a result of seeing a weapon.

Q. All right. Now, have you—are you aware of the size of Oklahoma City?

A. Well, I asked the fellow who picked me up last night. He told me there was about 700,000 people. I don't

know if that's accurate, but I know it's a large—comparable to Jacksonville where I work as an officer; it's a half a million people.

Q. Are you aware that of the physical size, the square mileage?

A. No, I'm not.

Q. Are you aware of the size of the police department?

A. No, I can only make an estimate based on the—it's a common formula—proportionate to the size of the community. We're talking about a large metropolitan department, I'm certain.

Q. But you don't know how many police officers are on the Oklahoma City police force?

A. No, nor, nor what their, "B" configuration was on the night in question nor how they were deployed.

Q. Or where they were stationed that night?

A. No. But I do know from reading the depositions that backup units were proximate and en route, at least one two-man unit, and I believe one, one-officer unit.

Q. And do you know where those units were in relation to the (p. 297) Will Do Club?

A. Close enough to make their arrival pretty quick. I don't know, I don't know specifically where they were. It would be meaningful to know since I'm not familiar with the layout of the streets.

Q. Okay. You went to the Will Do Club last night, is that correct?

A. That's correct.

Q. Are you familiar with that area? Do you know what type of area it is?

A. Oh, on the basis of my, my trip there last evening, yes.

Q. Do you know what the crime incidents is in that area?

A. It looked to be, it looked to me to be something sort of what criminologists call an interstitial area, I-N-T-E-R-S-T-I-T-I-A-L, which is a, which is a criminology term for an area characterized by not the most savory atmosphere in the world. It looked to be a, little bit of a, the bar itself looked to be not the most savory establishment.

Q. Do you know how many armed robbery calls are answered in Oklahoma City in bars per year?

A. No, I don't.

Q. Do you have any idea how many armed robbery calls in bars turn out to be accurate and false?

A. I'm aware that there are, as a police officer myself, I m (p. 298) aware that there's, a very large number of reported robbery calls are false.

Q. And specifically in bars, do you know how many are false calls in bars?

Mr. Gassaway: If it please the court, we let this go along for a while but I think we're getting beyond the scope of relevancy of this specific incident at this point.

The Court: Overruled. He can answer if he can.

A. I'm not aware of the, of the percentage in Oklahoma City of armed robbery calls in bars that are false, I couldn't concede to that.

Q. All right. And you spoke earlier of the difference between a felony and misdemeanor. Do you recall that testimony?

A. Yes.

Q. Do you know what the difference between a felony and a misdemeanor is in Oklahoma regarding robberies?

A. I have not, not seen the statute of the State of Oklahoma, so I couldn't concede to it.

Q. Would you be surprised to find out that the theft of anything over $20 is a felony?

A. Again, I'd have to see the statute. I'm not, I'm just not aware of what the, what the statutory definition of a felony is.

Q. Would you be surprised that $20 is the difference between the—

(p. 299) Mr. Gassaway: If the court, please, I'll object to that. That's not what the law is.

The Court: Sustained.

Mr. Mahoney: No more questions.

The Court: Redirect?

Mr. Gassaway: Thank you, Your Honor.

Redirect Examination

By Mr. Gassaway:

Q. Has any of that cross-examination changed your opinion that this shooting wasn't justified?

A. No.

Q. Now, something particularly causes me some concern during that cross-examination. They said for you to assume that Rotramel saw a man bent over, reach for a weapon, then said halt, and the man jumped, and he shot him, okay?

A. Yes.

Q. You are aware, are you not, that the bullet hole entered approximately right here (indicating) in the man's back?

A. And exited in the front.

Q. And exited 6.5 inches higher?

A. Yes.

Q. And you are aware that the officer drew down on the man from shoulder length?

A. Yes.

Q. Can you tell me how in the world you can get a trajectory of (p. 300) a bullet coming out 6 inches, 6.5 inches higher if the man had jumped?

Mr. Mahoney: Objection. I believe this is outside of the scope of what we've got here.

The Court: Overruled.

A. Now, again I don't purport to be a ballistics specialist, but as a police officer who has seen many, many shooting situations, I can't fathom how this shooting could have occurred the way it is purported to happen.

Q. And would it not be consistent—and the medical examiner in his interrogatories said that there was no deflection to cause it to go up, that the bullet hit a rib, but it didn't cause it to deflect—could there be any way that the man could have been shot except in his butt, if his rear end was higher than his head to get that trajectory to come out like it did?

Mr. Mahoney: Your Honor, he's already said he's not a ballistics expert.

The Court: Overruled.

A. Again, the same comment. As a police officer having seen shootings and reading of the facts in the case, I don't, I don't understand how that could have happened.

Q. So that man would have to be down, either bent over as Officer Rotramel thought he was, or having stumbled?

A. Yes, suffice it to say, he would have to be in, in (p. 301) non-menacing, because there's no way—I tried this, tried, my wife's assistance trying different positions trying to recreate what happened, and there's no way you can come out with any kind of threat to the officer, under these certain conditions, there is no way.

Q. And Officer Rotramel stated in his sworn deposition testimony that the shot, when he got hit with the bullet, did not knock him to the ground. Yet, the medical examiner's report indicates the man had abrasions of the knee and elbow. Would these abrasions take into consideration the fact that the shot did not knock him down be consistent with the man having stumbled and trying to get back up when he was shot?

A. I would think so.

Mr. Gassaway: That's all.

The Court: You may step down.

A. Thank you.

Office - Supreme Court, U.S.
FILED
DEC 15 1984
ALEXANDER L. STEVAS

No. 83-1919

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

CARL HUGHES*
MICHAEL GASSAWAY
Hughes, Nelson & Gassaway
1501 N. Classen, Suite 200
Oklahoma City, Oklahoma 73106
(405) 528-2300
Attorneys for Respondent

Of Counsel:

J. LEVONNE CHAMBERS
ERIC SCHNAPPER
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

December, 1984

*Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or custom of a municipality sufficient to render the municipality liable in damages under 42 U.S.C. §1983.*

*This is the question recited in the Petition for Writ of Certiorari and the Brief for Petitioners. We urge at pages 38-39 of this brief that this question is not in fact presented by this case.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
RULES INVOLVED	1
STATEMENT OF THE CASE	2
(1) The Killing of William Tuttle	2
(2) Proceedings in the District Court	4
(3) Proceedings in the Court of Appeals	10
SUMMARY OF ARGUMENT	12
ARGUMENT:	
I. The Evidence Was Sufficient to Support the Jury's Finding of Municipal Liability Under *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978)	15
(1) The Decision in *Monell*	15
(2) The Standard of Review	23
(3) The Evidence in This Case	29
II. The "Question Presented" By Petitioner Is Not in Fact Presented By This Case	38
III. *Monell* Does Not Require that the Municipal Policy or Decision Which Injured a Plaintiff Have Also Injured Other Individuals	40
CONCLUSION	48

TABLE OF AUTHORITIES

Cases	PAGE(S)
Anderson v. City of Bessemer City, No. 83-1623	25
Anderson v. Smith, 226 U.S. 439 (1913)	24
Bailey v. Central Vermont R. Co., 319 U.S. 350 (1943)	24, 25
Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984)	18, 42
Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982)	43
Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)	4
Black v. Stephens, 662 F.2d 181 (3rd Cir. 1982)	16
Castle v. Bullard, 64 U.S. 172 (1859)	45
Continental Ore Co. v. Union Carbide Co., 370 U.S. 690 (1962)	24
Ellis v. Union Pacific R. Co., 329 U.S. 649 (1947)	24, 25, 26
Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980)	16
Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963)	20
Gilmore v. City of Atlanta, 735 F.2d 838 (5th Cir. 1984)	42
Gunning v. Cooley, 281 U.S. 90 (1930)	25
Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982)	16, 17
Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981)	43
Hodges v. Easton, 106 U.S. 408 (1882)	28
Hopper v. Evans, 456 U.S. 605 (1982)	46
Jones v. East Tennessee, V. & G.R. Co., 128 U.S. 443 (1898)	27
Kane v. Northern Cent. R. Co., 128 U.S. 91 (1888)	24
Katris v. City of Waukegan, 498 F. Supp. 48 (N.D. Ill. 1980)	17
Kingsville Independent School District v. Cooper, 611 F.2d 1109 (5th Cir. 1980)	16, 17

AUTHORITIES CONTINUED — PAGE(S)

Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) ... 43
Lavender v. Kurn, 327 U.S. 645 (1946) ... 24, 25
McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979) ... 43
Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) ... *passim*
Monroe v. Pape, 365 U.S. 167 (1961) ... 15, 19, 32
Owen v. City of Independence, 455 U.S. 622 (1980) ... 40
Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979) ... 46
Palmer v. Hoffman, 318 U.S. 109 (1943) ... 45
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) ... 28
Parratt v. Taylor, 451 U.S. 527 (1981) ... 11, 19
Pawling v. United States, 8 U.S. (4 Cranch.) 219 (1808) ... 24
Peters v. Township of Hopewell, 534 F. Supp. 1324 (D.N.J. 1982) ... 17
Pullman Standard Co. v. Swint, 456 U.S. 273 (1982) ... 20
Richmond & Danville Railroad Co., v. Powers, 149 U.S. 43 (1893) ... 25
Scheuer v. Rhodes, 416 U.S. 232 (1974) ... 46
Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974) ... 41
Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980) ... 16
Scott v. London & St. Katherine Docks Co., 3 H. & C., 496, 159 Eng. Rep. 665 (1865) ... 45
Sioux City & Pacific R.R. Co. v. Stout, 84 U.S. 657 (1874) ... 26
Teamsters v. United States, 431 U.S. 324 (1977) ... 42
Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29 (1944) ... 24, 25, 26
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 (1943) 26
Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980) ... 43, 46
Warth v. Seldin, 442 U.S. 490 (1975) ... 41
Webster v. City of Houston, 735 F.2d 838 (5th Cir. 1984) ... 42

AUTHORITIES CONTINUED — PAGE(S)

Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983) ... 43
Wilkerson v. McCarthy, 336 U.S. 53 (1949) ... 24
Zant v. Stephens, 77 L.Ed.2d 235 (1983) ... 46

United States Constitution

Fourth Amendment ... 4
Fifth Amendment ... 4
Sixth Amendment ... 4
Seventh Amendment ... 13, 28, 29
Fourteenth Amendment ... 4

United States Code

28 U.S.C. § 1331 ... 4
28 U.S.C. § 1343 ... 4
28 U.S.C. § 1391(b) ... 4
42 U.S.C. § 1983 ... 15, 38
42 U.S.C. § 1985 ... 4
42 U.S.C. § 1986 ... 19
42 U.S.C. § 1988 ... 4

Federal Rules of Civil Procedure

Rule 51 ... 1, 45
Rule 52 ... 13

Federal Rules of Evidence

Rule 401 ... 1

Miscellaneous

1 Annals of Congress (1789) ... 28
J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1856) ... 28
W. Prosser & W. P. Keeton, *The Law of Torts* (5th ed. 1984) ... 19
G. Rude, *Wilkes and Liberty* (1962) ... 27
Writings of Thomas Jefferson (Washington ed. 1861) ... 27
"Civil Rights Litigation after *Monell*", 79 Col. L. Rev. 213 (1979) ... 32

No. 83-1919

In the
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF OKLAHOMA CITY,
Petitioner,

v.

ROSE MARIE TUTTLE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

RULES INVOLVED

Rule 51, Federal Rules of Civil Procedure, provides in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Rule 401, Federal Rules of Evidence, provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

STATEMENT OF THE CASE

(1) The Killing of William Tuttle

Although many details of the events leading to this litigation were the subject of sharply conflicting trial testimony, certain basic facts are not in controversy. On October 4, 1980, the Oklahoma City Police received a telephone call reporting that an armed robbery was in progress at a bar known as the We'll Do Club. The caller, laughed during the report, and described the alleged robber as a 37-year-old white male with brown hair and glasses. The dispatcher radioed the report to police cars in the vicinity of the Club. The first car to arrive at the scene was driven by Police Officer Julian Rotramel, a rookie officer who nad completed the police academy only ten months earlier. Although rookie patrolmen less than a year out of the academy frequently rode with experienced senior officers, Rotramel had been assigned to patrol on his own. When Rotramel arrived at the bar a second backup car, driven by an experienced officer, was less than a minute away. Rotramel chose, however, not to await the imminent arrival of a backup unit; he parked his patrol car directly in front of the bar and entered it alone.

No robbery was in progress, threatened, or had in fact occurred at the bar. Whether or not Rotramel was actually told this when he was in the bar is among the issues that were disputed at trial. In any event, shortly after Rotramel entered the bar, he was approached by William Tuttle. Because Tuttle matched the description of the alleged robber, Rotramel directed Tuttle to remain in the bar. Tuttle initially complied, but then left the bar through the same door

by which Rotramel had entered. Rotramel followed Tuttle out of the bar, drawing his service revolver as he left. Outside the bar Rotramel observed Tuttle approximately ten feet away. Tuttle had his back to Rotramel, and was in a crouched position. Rotramel fired his service revolver, hitting Tuttle in the back.

When Rotramel shot Tuttle, another officer, Riley Lennox, had already arrived at the bar, but was on another side of the building out of sight of the shooting. Lennox hurried to the scene of the shooting, and was directed by Rotramel to search the boots of Mr. Tuttle, who lay dying on the sidewalk. Lennox conducted a search of the boots, but found nothing. Tuttle's wife, who had had a baby only 5 days earlier, was called to the scene, but was not permitted to see or talk to her husband. Tuttle was taken by ambulance to a local hospital, in the custody of several police officers. At the hospital a nurse who was treating Tuttle removed his boots, and this time a toy plastic cap pistol fell out. Tuttle died shortly after arriving at the hospital. (J.A. 63-64).

It is undisputed that Tuttle was neither an armed robber nor chargeable with any other felony. Similarly, all parties agree that Tuttle in fact never had a gun or any other type of dangerous weapon. Tuttle never made any verbal threats to Rotramel and never posed any actual danger to Rotramel, Lennox, or any other officer or civilian. The most serious offense with which Tuttle could have been charged was leaving the custody of officer Rotramel, a misdemeanor for which the maximum penalty is a $35 fine.

(2) Proceedings in the District Court

Respondent Rose Marie Tuttle, William Tuttle's widow, commenced this action in the United States District Court for the Western District of Oklahoma. Her complaint was brought pursuant to sections 1983, 1985, 1986 and 1988 of 42 U.S.C., and directly under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution. See *Bivens* v. *Six Unknown Federal Narcotics Agents*,[1] 403 U.S. 388 (1971). Jurisdiction was based on 28 U.S.C. §§ 1331, 1343, and 1391(b). The complaint named as defendants both officer Rotramel and the City of Oklahoma City. Respondent alleged that in killing Tuttle, Rotramel "was acting pursuant to the orders and directives" of the city (J.A. 15), and that the city had "inadequately trained" its police officers. (J.A. 16). Respondent sought compensatory and punitive damages, as well as an award of costs and counsel fees. (J.A. 20-21).

In the trial court both the city and officer Rotramel[2] were represented by the City Attorney of Oklahoma City. The nature of the defense adduced at trial is of considerable importance because it is very different from the contentions now advanced by the city. In this Court the city insists that

[1] Neither court below considered whether the peculiar requirements of *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1958), rooted as they are in the particular legislative history of the 1871 Civil Rights Act, are applicable to an action brought directly under the Constitution. Should this Court hold that the decision of the Tenth Circuit cannot be upheld under *Monell*, the question of what impact *Monell* has on a *Bivens* action should be remanded for consideration in the first instance by the court of appeals

[2] By the time this action came to trial Rotramel was no longer on the police force.

"the act of Rotramel in discharging his service revolver and thereby causing the death of William Tuttle, was at odds with the 'official policy' of Oklahoma City." (P.Br. 20; see also *id.* at 19, 21). But at trial, counsel for petitioner contended that Rotramel's action was absolutely proper. The Answer filed by petitioner asserted the following "affirmative defenses":

> That the Defendant employee at all times herein mentioned acted in good faith without malice and within the scope of his duties as a police officer of the City of Oklahoma City and peace officer of the State of Oklahoma.
>
> • • •
>
> That the actions of the Defendant and its employee were lawful and proper and probable cause existed for the arrest of Tuttle.
>
> That the action of the Defendant and its employee in all respect [sic] was reasonable, proper and legal. (J.A. 22-23).

The defense offered by the city at trial was not that Rotramel had erroneously shot Tuttle in violation of city policy, but that Rotramel's action was proper in every respect. After eliciting testimony intended to show that Rotramel had killed Tuttle because he feared that Tuttle was about to shoot him, counsel for the city argued:

> There's no problem with the policy, I don't believe . . . [Rotramel] shot that man because he thought his life was in danger. He did not wait to see an offensive weapon. . . . He thought William Adam Tuttle was the armed robber. He was in a position to grab a weapon. He was in a position to turn around and shoot him, and I submit to you, he shouldn't have to wait to see that

> weapon under those circumstances. . . . I contend that officer Rotramel acted in a reasonable and good faith belief, while he was acting as a police officer, and as he should have reacted, to protect his life. . . . He was acting as should have acted, acting as he reasonably believed he was in danger of his life. He was a properly trained police officer. . . . I hope that you'll bring back a verdict for both defendants, Julian Rotramel, for acting properly, and for the City of Oklahoma City for training him so. (Tr. 672-79).

In this Court the city denounces Rotramel's conduct as "excessive" and unauthorized, but in the district court the city urged the jury to conclude that Rotramel's action was entirely consistent with city policies and training.

The defense adduced at trial hinged, not on any criticism of Rotramel's action, but on a disagreement about what had occurred on the night of October 4, 1980. The city offered testimony which, if believed, might have led a jury to conclude that Rotramel had substantial reason to think that Tuttle had a gun and was preparing to use it. Rotramel testified that the barkeeper did not tell him there was no armed robbery in progress,[3] that while in the bar Tuttle had twice attempted to reach for his boot,[4] that Rotramel had physically restrained Tuttle[5] until Tuttle broke loose and ran out of the bar,[6] that Rotramel had repeatedly shouted at Tuttle to halt,[7] and that outside the

[3] J.A. 169, 179, 210.

[4] J.A. 171, 179, 207, 209.

[5] J.A. 168, 169, 178, 203, 205.

[6] J.A. 179.

[7] J.A. 158, 170, 172, 180, 183, 222.

bar Tuttle had jumped up and started to turn around before Rotramel shot him.[8] Witnesses who were in the bar, on the other hand, gave a completely different story, asserting that Rotramel was expressly assured in the bar that there was no robbery in progress[9] that Tuttle had never reached in his boot,[10] that Rotramel had not tried to restrain Tuttle physically,[11] that Tuttle had merely walked out the door,[12] and that Rotramel had never shouted halt.[13] Medical evidence offered by plaintiff indicated that outside the bar Tuttle had stumbled rather than crouched to reach for his boot,[14] and that Tuttle was still bent over when he was shot in the back.[15] The testimony offered by plaintiff's witnesses, if credited by the jury, could have compelled the conclusion that Rotramel had killed Tuttle without any reasonable justification.

There was also conflicting evidence on several other issues. First, the various police officials who testified gave different answers regarding whether under city policy a police officer were authorized to shoot a possibly dangerous suspect if the officer had not actually seen a gun or other

[8] J.A. 158, 183, 224.

[9] J.A. 82, 83, 90, 106. Rotramel himself told one investigating officer that he had received that assurance. Tr. 204, 211.

[10] J.A. 84, 100, 107.

[11] J.A. 83-84, 97.

[12] J.A. 109, 132.

[13] J.A. 86, 100, 110, 132; Tr. 601.

[14] Tr. 181.

[15] Tr. 177, 178, 179, 300.

weapon in the suspect's possession.[16] Second, witnesses called by petitioner and respondent disagreed about the adequacy of the city's training policies and about whether any defects in those policies had caused the killing of Tuttle.[17] Third, the testimony raised questions about whether Rotramel was adequately supervised particularly concerning whether Rotramel was too inexperienced to have been permitted to be on patrol by himself.[18]

The district judge instructed the jury, in a manner entirely consistent with *Monell*, that the city could only be held liable if respondent proved both the existence of a city policy, and that that policy had caused the alleged constitutional violation.[19] Petitioner did not object to those instructions at trial, and does not complain of them here. Throughout the proceedings in the district court, however, the city consistently but unsuccessfully insisted that to establish municipal liability under *Monell* respondent was required to establish, not merely that the alleged policies had resulted in the unconstitutional killing of Tuttle, but also that those policies had brought about other similarly unconstitutional police killings or assaults.

The jury returned a verdict holding the city liable for $1,500,000 in actual damages, but imposing no liability on officer Rotramel. The city attorney attacked these verdicts

---

[16]The conflicting testimony regarding whether city policy authorized the shooting in question is discussed at pp. 29-32, *infra*.

[17]The conflicting testimony regarding the city's training policies is discussed at pp. 31-32, *infra*.

[18]See pp. 36-37, *infra*.

[19]See pp. 21-22, *infra*.

as inconsistent, apparently insisting that the jury either also hold Rotramel liable or to exonerate both his clients. (Tr. 696, 702). The district judge concluded that the verdicts were consistent:

> "[W]here a municipality pursues as a matter of policy activities that do not comport to the constitution . . ., its liability is absolute even though officials who implement such policies are protected by qualified immunity." . . . I think the good faith defense on behalf of an individual which is not available to the city or municipality is the linchpin of the fact that this is not inconsistent.
>
> • • •
>
> Now, I thought that that was perhaps the hardest part of the plaintiffs case to prove that the failure to train or inadequacy of the training was willful and wantonly negligent. . . . I submitted it to the jury . . . and the jury apparently felt that that was where they thought the illness lay rather than upon officer Rotramel, who I assume . . . they felt that although he did violate the decedent's constitutional rights, that it was in the good faith belief that he had the right to do so under the circumstances here.

(Tr. 703-06). The city moved orally and in writing for judgment notwithstanding the verdict. The district court denied both motions, concluding "the plaintiff brought forward sufficient evidence regarding inadequate training and procedures to warrant submission to the jury of the issue of municipal liability . . ." (J.A. 58).[20]

---

[20]See also Tr. 702 (respondent adduced, not only proof of the constitutional violation at issue, but "additional evidence of . . . lack of training or failure to train, or failure to supervise . . ."), 704 ("there was considerably more evidence presented here than the fact that the . . . shot

(3) Proceedings in the Court of Appeals

Both petitioner and respondent appealed from the verdict and the decision of the district court. Respondent contended that the judgment in favor of officer Rotramel was improper, and that the trial judge should have directed a verdict against Rotramel on the issue of liability. The city challenged on a number of grounds the verdict against it. The tenth circuit rejected both appeals.

In upholding the verdict in favor of Rotramel, the court of appeals emphasized the role of the jury in resolving the conflicting testimony. (J.A. 65). The court of appeals recognized that Rotramel's good faith defense "does not seem to be strongly supported," but concluded that the issue was properly submitted to the jury for decision. (J.A. 66). "Inasmuch as the jury was properly instructed and since there is evidence which favors Rotramel, we cannot assume that the [jury's] conclusion was improper." (J.A. 66). If the jury construed the evidence "in the light most favorable to the defendant . . . it could find that he reasonably believed his response was permitted." (J.A. 65-66).[21]

---

[20](Continued)

someone in deprivation of their civil rights. There was a good deal of evidence. . . ."), 704-05 ("I was impressed with the evidence that was presented in this case that the curriculum methods and the lack of supervision and training was more than . . . just negligence"), 706 ("you put in enough evidence in my opinion that reasonable minds could differ with regard to that.").

[21]The court of appeals' opinion asserts that "Rotramel admitted at trial that he violated Police Department policy in shooting Mr. Tuttle." (J.A. 65). That is not correct. Rotramel insisted that his action was entirely consistent with city policy. See pp. 29-30, *infra*.

Petitioner argued in the tenth circuit that the trial judge had instructed the jury that it could find the city liable for a policy that was merely negligent, and insisted that respondent should have been required to prove gross negligence. The court of appeals rejected this objection on the ground that the jury had in fact been instructed that the city could not be held liable unless there was "gross negligence and deliberate indifference to the rights of the decedent." (J.A. 69). Somewhat inexplicably, the tenth circuit's opinion contains no reference to this Court's opinion in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), which expressly rejected the contention that liability could not be imposed in a section 1983 action without a showing of intentional or grossly negligent conduct.

Petitioner also contended that respondent had failed to adduce sufficient evidence to warrant submitting to the jury any claim against the city. The court of appeals, however, observed that, in addition to the particular circumstances surrounding the killing of Tuttle,

> there was plenty of independent proof of lack of actual training. In this case the individual defendant had been on the police force for a very short period of time; moreover, he admitted his lack of training to cope with robberies. Nevertheless, he was allowed to go in on a suspected robbery by himself. (J.A. 71).[22]

The tenth circuit therefore concluded that there was "adequate evidence" to warrant submission of the claim to the jury. (J.A. 68).

---

[22]See also J.A. 68 ("Even the officer admitted the inadequacy of the training").

Third, respondent argued in the court of appeals, as it does here, that municipal liability under *Monell* required proof of a series of constitutional violations, and that a city could not be held liable if there was only a "single incident." The tenth circuit held that the relevance and importance of evidence of any other violations depended in each case on the type of municipal policy which a plaintiff sought to prove, and on the nature of the other evidence which the plaintiff adduced to support his or her claim. In this case the court of appeals concluded that respondent had produced sufficient evidence, over and above the killing of Tuttle, to warrant submission of her claim to the jury. (J.A. 70-71).

The court of appeals also upheld the amount of damages awarded by the jury. Judge Barrett concurred on the ground that "the trial court properly and adequately instructed the jury." (J.A. 72).

SUMMARY OF ARGUMENT

I. The district court in this case expressly instructed the jury that it could not impose liability on the city based on *respondeat superior*, and that municipal liability would have to be based on a finding (a) that there was a relevant city official policy or action, and (b) that that official policy or action had caused the death of respondent's husband William Tuttle. The jury was also instructed that the issue of whether or not Tuttle's death was caused by a city policy was "a question of fact." (J.A. 43). Each of these instructions was consistent with *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), and none were objected to by petitioner.

The jury verdict in this case must be sustained on appeal even though the evidence might justify a finding either way. The Seventh Amendment limits appellate review of jury verdicts even more severely than the Rule 52 restriction on appellate review of trial court findings. See *Pullman Standard Co.* v. *Swint*, 456 U.S. 273 (1982). Appellate reconsideration of a jury verdict is particularly inappropriate when, as here, issues of credibility are involved. *Compare Anderson* v. *City of Bessemer City*, No. 83-1623. In reviewing a jury verdict this Court must "view the evidence in the light most favorable to [the prevailing party] and . . . give it the benefit of all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide Co.*, 370 U.S. 690, 696 (1962).

In this case there was conflicting evidence regarding whether (a) the shooting of Tuttle was authorized by city policy, (b) the shooting was caused by inadequate city training policies, and (c) the shooting was caused by inadequate city supervision policies. The resolution of this conflicting evidence was a matter for the jury.

II. The question presented framed by petitioner is whether the mere existence of a single act of police brutality compels as a matter of law a finding of municipal liability. This case presents no such question.

This case is not a case in which the plaintiff proved only that an innocent civilian had been killed. Respondent offered direct evidence that the shooting was caused by municipal policies. The officer who shot Tuttle testified that city training policies were inadequate and had led to Tut-

tle's death. The offical who was Chief of Police when Tuttle was shot insisted that the shooting was entirely consistent with city policy.

The implausible doctrine to which petitioner objects—that a single constitutional violation invariably compels a finding of municipal liability—has never been advanced by respondent, was not adopted by either court below, and is not presented by this case.

III. Petitioner appears to argue that a plaintiff under *Monell* must prove *both* the existence of a policy or custom that caused the injury complained of *and* the existence of "a regular pattern of constitutional deprivations." Nothing in *Monell* sanctions this second requirement. *Monell* itself provided that an official "decision" would suffice to establish liability, although a single decision will often have only a single victim. There was only one constitutional violation and deprivation in *Owen* v. *City of Independence*, 455 U.S. 622 (1980).

Proof of a "regular pattern of constitutional deprivations" is not the only type of evidence on which a plaintiff can rely to prove an official policy or decision. Such proof clearly cannot be required where a plaintiff asserts the existence of a policy or decision which by its own terms will have only one victim. Even as to policies which might cause several constitutional violations, direct evidence of the substance of those policies, such as was introduced here, is at least as probative as a statistical pattern of injuries suggesting the existence of a common cause

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING OF MUNICIPAL LIABILITY UNDER *MONELL v. NEW YORK CTY DEPT. OF SOCIAL SERVICES*, 436 U.S. 658 (1978).

(1) The Decision in *Monell*

The issue raised by the petitioner in this Court poses a narrow question regarding the circumstances under which damages may be awarded against a city under *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978). Petitioner has not sought, and this case does not require, any comprehensive exegesis of *Monell*, but the basic holding of that decision provides the context in which the present case arises.

Prior to *Monell* this Court had held in a series of decisions dating from *Monroe* v. *Pape*, 365 U.S. 167 (1961), that a local government was not a "person" subject to suit under 42 U.S.C. § 1983.[23] *Monell* overruled *Monroe*, and held that that earlier decision had misread the legislative history of the 1871 Civil Rights Act, from which section 1983 is derived. *Monell* also concluded, however, that a local government could not be held liable under section 1983 merely because a government employee had engaged in unconstitutional conduct. To establish a claim under *Monell* a plaintiff is required to establish two distinct elements, first, that there was a relevant official action or custom, and, second, that that action or custom had caused the constitutional violation complained of. 436 U.S. at 692-95.

---

[23] *But see Monell* v. *New York City Dept. of Social Services*, 436 U.S. at 663 and nn.5 and 6.

Monell recognized that in establishing the existence of an official action a plaintiff might rely either on the identity of the official who took that action or on the substance the action itself. Thus *Monell* referred both to action "by those whose edicts or acts may fairly be said to represent official policy," 436 U.S. at 694, and to "a policy statement, ordinance, regulation, or decision officially adopted and promulgated. . . ." 436 U.S. at 690. In any governmental unit there will be some individuals with such broad authority that all of their "edicts or acts may fairly be said to represent official policy." [24] But liability under *Monell* is not limited to the conduct of high ranking officials; it extends to any action or policy that has received "approval through the body's official decision making channels." 436 U.S. 691. Frequently the official decisionmaking process in a city or county will be delegated to a number of subordinate employees. The policy at issue in *Monell*, for example, had been adopted by a minor personnel official of the Department of Social Services, exercising authority delegated to him by his supervisors.[25]

---

[24] A number of lower court decisions under *Monell* have focused on the high position of the government employee responsible for the constitutional violation. *Hearn* v. *City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982) (city manager and personnel director); *Black* v. *Stephens*, 662 F.2d 181 (3rd Cir. 1982) (police chief); *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109 (5th Cir. 1980) (trustees of school board). Several decisions correctly observe that the actions of officials who exercise the "final authority" over some area of responsibility are necessarily official action under *Monell*. *Schneider* v. *City of Atlanta*, 628 F.2d 915, 920 (5th Cir. 1980); *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

[25] *Monell* v. *New York City Dept. of Social Services*, stipuation dated May 16, 1974, p. 2. The lower courts have consistently recognized that

Monell does not require proof of an ordinance, regulation or policy of general application which injures a number of different individuals; a single "decision", possibly harming only one person, is sufficient. In *Owen* v. *City of Independence*, 455 U.S. 622 (1980) the city "policy" which gave rise to liability under *Monell* was the dismissal of a single city employee.

Monell also held that a city or county could be held liable on the basis of an official custom. This holding has its roots in the language of section 1983, itself, which provides a cause of action for certain conduct ". . . under color of any law, statute, ordinance, regulation, custom, or usage of any State. . . ." This Court noted that in framing section 1983 Congress had "included such customs and usage because of persistent and widespread discriminatory practices by state officials." 436 U.S. at 691. *Monell* emphasized that the actual practices of government officials were often a better indication of official policy than ordinances or regulations which might ignore or even forbid those very practices:

> It would be a narrow conception of jurisprudence to confirm the notion of "laws" to what it found written on the statute books . . . settled state practice . . . can establish what is state law. . . . Deeply embedded tra-

---

[25] (Continued)

a plaintiff may meet his burden under *Monell* by offering proof of action taken by officials exercising delegated authority or discretion. *Hearn* v. *City of Gainesville*, 688 F.2d 1328, 1334 (11th Cir. 1982); *Kingsville Independent School District* v. *Cooper*, 611 F.2d 1109, 1112 5th Cir. 1980); *Peters* v. *Township of Hopewell*, 534 F.Supp. 1324 (D.N.J. 1982); *Katris* v. *City of Waukegan*, 498 F.Supp. 48, 51 (N.D. Ill. 1980).

> ditional ways of carrying out state policy . . are often tougher and truer law than the dead words of the written text.

436 U.S. at 691 n.56. The lower courts have generally held that a custom within the meaning of *Monell* is established where a plaintiff shows that a particular practice occurred with such frequency or notoriety that responsible supervisory officials would or should have known of its existence.[26]

In addition to proving the existence of an official action, policy or custom, a plaintiff must also demonstrate that that action, policy or custom in fact " 'cause[d]' an employee to violate another's constitutional right." 436 U.S. at 692.[27] Section 1983 imposes liability on any person who "shall subject, or cause to be subjected, any person" to a deprivation of a constitutional right. Thus an action, policy or custom might cause a constitutional violation in either of two ways. First, a city policy might itself be unconstitutional, such as a rule that police are to shoot at a fleeing suspect if he or she is black. Second, a city policy, although not unconstitutional on its face, might cause municipal employees to engage in unconstitutional conduct, such as a practice of teaching police rookies how to shoot to kill, but not instructing them when they should and should not shoot at all.

---

[26] *Bennett* v. *City of Slidell*, 728 F.2d 762 (5th Cir. 1984) noted, "where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation."

[27] *See also id.* at 691 (government liable only if official action or custom "of some nature caused a constitutional tort.").

In *Parratt* v. *Taylor*, 451 U.S. 527 (1981), this Court held that in a section 1983 action against an individual, liability could be imposed so long as it was foreseeable that the defendant's actions would cause a constitutional violation.[28] Nothing in *Parratt*, *Monell* or the language of section 1983 suggests that the negligence standard announced in *Parratt* is any less applicable when the "person" named as the defendant is a government body rather than a government employee or some other individual. The legislative history of section 1983 relied on in *Monell* itself clearly indicates that Congress believed liability appropriate where a government defendant with the ability to prevent an injury "neglect[ed] or refuse[d] so to do." 436 U.S. at 692 n.57, quoting 42 U.S.C. § 1986.

The elements which *Monell* establishes as essential to a claim against a municipality—causation and custom or official action—are all essentially factual in nature. The issue of causation under *Monell* is indistinguishable from the issues of causation which frequently arise in ordinary tort actions, and are generally regarded as issues of fact to be resolved by a jury. A question of "proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." W. Prosser & W. P. Keeton, *The Law of Torts* p. 321 (5th ed. 1984).

In *Monell* actions the parties are typically in disagreement as to whether the action of a particular employee

---

[28] *Monroe* v. *Pape* had earlier noted that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187.

which occasioned the injury at issue was caused by the poor judgment or malice on the part of that employee, or by the directions and training, or lack thereof, which the employee received from the city. Such disputes are similar to questions of motivation, the factual nature of which this Court emphasized in *Pullman-Standard Co.* v. *Swint*, 456 U.S. 273, 288-89 (1982). When, as will ordinarily be the case, reasonable observors could disagree about why a city employee engaged in unconstitutional conduct, the matter must be left to the jury. If in such a case the jury concludes that the constitutional violation was caused by a city action, policy or custom, "[i]t does not matter that, from the evidence, the jury may also with reason . . . attribute the result to other causes." *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 117 (1963).

A claim that a constitutional tort was caused by an official custom would raise similarly factual issues. Although *Monell* holds that a custom can be demonstrated by proof of "persistent and widespread . . . practices," 436 U.S. at 691, *Monell* does not fix any particular number of discrete incidents as necessary or sufficient to meet that standard. Similarly, althought the lower courts generally, and in our view correctly, have held that incidents of particular gravity or notoriety are especially probative of the existence of a custom, no mechanical test has been suggested or can readily be imagined for factoring in the significance or triviality of the events alleged to demonstrate a custom. The weighing of such evidence must ordinarily be left to a jury instructed to decide whether that evidence is sufficient to establish a custom for which the government involved may fairly be held accountable.

Disputes about the existence of an official action or policy are similarly factual in nature. In this particular case the district judge expressly instructed the jury that "[t]he existence of . . . a policy is a question of fact for you to determine" (J.A. 43); respondent did not object to that instruction at trial and does not complain of it here. The factual disputes that arise in *Monell* actions about the existence of an official action are typically one or both of two varieties: first, whether a particular action was taken or policy was promulgated by a given official; second, whether the official responsible for that action or policy was exercising delegated authority. In government agencies where actual practice may often seem to differ from policies suggested by written rules or trial testimony, the record will ordinarily present conflicting evidence which only a jury can resolve. Similarly, in local government bodies where the delegation of authority is generally informal and unwritten, the evidence adduced at trial will often support different conclusions.

The specific instructions of the district judge in the instant case closely tracked the language of *Monell*. The judge expressly admonished that it could not hold the city liable merely because officer Rotramel was a municipal employee:

> If a police officer denies a person his constitutional rights, the city that employs that officer is not liable for such a denial of that right simply because of the employment relationship. Thus, in this particular case, you are instructed that the City of Oklahoma City is not liable for the deprivation of the decedent's constitutional rights solely because it hired and employed the Defendant Rotramel. But there are circumstances

> under which a city is liable for a deprivation of a constitutional right. Where the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, the city may be held liable. (J.A. 42).[29]

The trial judge noted that the parties were in disagreement as to whether there was "an official policy of the City of Oklahoma City which results in constitutional deprivations" (J.A. 43); the jury was instructed, with regard to the conflicting claims and evidence:

> The existence of such a policy is a question of fact for you to determine. The policy, if it existed, need not be expressed in writing; it may be an implicit policy. An official policy can be inferred from the acts of a municipality's supervisory officials, as well as from its omissions. . . .
> (J.A. 43-44).

. The district judge also made clear that respondent was required to establish a causal connection between any official action, policy or custom and the injury complained of. (J.A. 42-43). The judge explained:

> Anyone who "causes" any citizen to be subjected to a constitutional deprivation is . . . liable. The required causal connection can be established not only by some kind of direct personal participation in the deprivation but also by setting in motion a series of acts by others which the actors know or reasonably should know would result in the constitutional injury being inflicted upon others. (J.A. 45-46).

---

[29]This instruction is essentially the same as the standard urged by petitioner in this Court. See P. Br. ii, 8, 9.

The petitioner did not object at trial to any of these instructions, and does not contend in this Court that any of them were incorrect. The instructions set out above are entirely faithful to the decision in *Monell*, and properly called upon the jury to resolve the conflicting contentions and testimony regarding both causation and the existence of official action or policy.

(2) The Standard of Review

Petitioner expressly contended in the court of appeals that district judge erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict, contending, as it did at trial, that the evidence was insufficient to justify submission of the case to the jury. (J.A. 66). Petitioner did not, however, seek review by this Court of this aspect of the tenth circuit's opinion, but limited its petition to the so-called "single incident" question discussed *infra*. In its principal brief in this Court petitioner does not refer to its unsuccessful motions in the district court, does not assert that the case was improperly submitted to the jury, and does not suggest that any dispute about the sufficiency of the evidence could be characterized as encompassed within the actual question presented. A brief review of the conflicting evidence adduced at trial is nonetheless necessary to understand the context in which the "single incident" question arises in this case.

In assessing the sufficiency of the evidence on which a jury based its verdict, neither a trial judge nor the appellate courts are free "to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel

that other conclusions are more reasonable." *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944).[30] A case must be submitted to the jury "if evidence might justify a finding either way," *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55 (1949), and "fair-minded men might reach different conclusions", *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 353 (1943). A direct verdict is inappropriate except in the extreme case in which there is only one reasonable conclusion that a jury could possibly draw. In assessing a request for such a directed verdict or judgment n.o.v., the courts are required "to view the evidence in the light most favorable to [the opposing party] and to give it the benefit of all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co.* v. *Union Carbide Co.*, 370 U.S. 690, 696 (1962).[31]

"[W]here, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury." *Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 653 (1947). In the instant case counsel for petitioner repeatedly and correctly contended in his closing argument that the jury's verdict would necessarily turn on its assess-

[30]See also *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946) (it is "immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.").

[31]*See also Anderson* v. *Smith*, 226 U.S. 439, 440 (1913) (court considering motion by defendant must adopt "the view most favorable to the plaintiff of the evidence"); *Kane* v. *Northern Cent. R. Co.*, 128 U.S. 91, 94 (1888) (opposing party to be given "the benefit of every inference to be fairly drawn from" the evidence); *cf. Pawling* v. *United States*, 8 U.S. (4 Cranch.) 219, 222 (1808) ("the testimony is to be taken most strongly against" the moving party).

ment of the credibility of the witnesses.[32] This Court has repeatedly emphasized that issues of credibility are solely within the province of the jury.[33] *Cf. Anderson* v. *City of Bessemer City*, No. 83-1623. The resolution of conflicting evidence is equally a matter for the jury alone. "Where uncertainty . . . arises from a conflict in the testimony . . . the question is not one of law but of fact to be settled by the jury." *Gunning* v. *Cooley*, 281 U.S. 90, 94 (1930).[34] "[T]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946).

[32]Tr. 671 ("I want you to recall what you heard off the witness stand, and recall each of those witnesses and their demeanor, and decide whom you believe"), 676 ("You have to see who you believe on the credibility of that witness [Hinds] . . ."), 677 ("You've seen all these witnesses. You have to decide which ones are telling the truth . . ."; "[Y]ou just have to depend on the credibility of officer Rotramel.").

[33]*Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 653 (1947). ("[T]he decision as to which witness was telling the truth . . . [is a] question[] for the jury"); *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946) ("I[I]t would be an undue invasion of the jury's historic function for an appellate court to . . . judge the credibility of witnesses . . ."); *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944) ("It is the jury, not the court, which . . . judges the credibility of witnesses . . .").

[34]*See also Ellis* v. *Union Pacific R. Co.*, 329 U.S. 649, 643 (1947); *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946); *Bailey* v. *Central Vermont R. Co.*, 319 U.S. 350, 353 (1943); *Richmond & Danville Railroad Co.* v. *Powers*, 149 U.S. 43, 46 (1893).

The drawing of inferences from both disputed and uncontroverted testimony is also ordinarily a matter for the jury:[35]

> It is the jury, not the court, which . . . draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.

Tennant v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944). In the instant case the trial judge instructed the jury, correctly and without objection, that it could "make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established. . . ." (J.A. 31). The drawing of such inferences "in the light of common experience" (J.A. 31) is consigned to the jury because of the very wealth and diversity of experiences which the members of the jury bring to their deliberations.[36]

---

[35] *Ellis* v. *Union Pacific R. Co.*, 329 U.S. at 653 ("[I]t would be an invasion of the jury's function for an appellate court to draw contrary inferences. . . ."); *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 68 (1943) (where " 'fair-minded men may draw different inferences,' the case should go to the jury.").

[36] "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the fact proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge." *Sioux City & Pacific R.R. Co.* v. *Stout*, 84 U.S. 657, 664 (1874).

The application of *Monell* frequently requires, as it did here, that the finder of fact resolve conflicting evidence and draw inferences regarding policies, customs, causation, and the delegation of authority. Several of the cases cited by petitioner reflect an ill-conceived inclination on the part of the lower courts to usurp the role of the jury in such matters. But nothing in *Monell* suggests that the factual issues made critical by that decision are to be resolved by courts. There is "no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as all others." *Jones* v. *East Tennessee, V. & G. R. Co* ,.128 U.S. 443, 446 (1898).

Deference to the preeminent role of the jury is particularly appropriate in actions such as this seeking redress for unconstitutional conduct by government officials. Although the Seventh Amendment's right to trial by jury extends to the most mundane commercial and tort litigation, the primary concern which led to the adoption of that guarantee was a desire to assure that in civil as well as criminal cases juries would protect and enforce the substantive rights guaranteed by the Constitution. The men who framed the Seventh Amendment were well aware of the critical role which civil juries had played in establishing the right against unreasonable searches and seizures.[37] Thomas Jefferson insisted that jury trials were "the only anchor yet imagined by man, by which a government can

---

[37] For a discussion of the infamous Wilkes case, and the resulting litigation, see, e.g., G. Rude, *Wilkes and Liberty*, 17-37 (1962).

be held to the principles of its constitution."[38] The Virginia convention resolved that "in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and [ought] to remain sacred and inviolable."[39] The first draft of the Seventh Amendment also characterized trial by jury in civil cases as "one of the best securities to the rights of the people."[40] This Court emphasized in *Hodges* v. *Easton*, 106 U.S. 408, 413 (1882), that the right of trial by jury in civil cases was intended as "a fundamental guaranty of the rights and liberties of the people."

In *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), Justice Rehnquist observed that the Seventh Amendment was adopted in part because its framers believed that juries would often be more vigilent than judges in enforcing fundamental liberties:

> The founders of our Nation considered the right of trial by jury in civil cases an important bulwork against tyranny . . . a safeguard too precious to be left to the whim of . . . the judiciary. . . . [T]he concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense . . . and thus keep the administration of law in accord with the wishes and feelings of the community. . . Those

[38] 3 *The Writings of Thomas Jefferson* 71 (Washington ed. 1861).

[39] 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 658 (1856).

[40] 1 Annals of Cong. 435 (1789).

> who favored juries believed that a jury would reach a result that a judge either could not or would not reach.

439 U.S. at 343-44 (dissenting opinion). Where, as here, the vindication of fundamental rights and liberties is at issue, federal judges should be particularly reluctant to interfere with the institution which the Seventh Amendment contemplates will prevent or provide redress for violations of the Constitution.

(3) The Evidence in This Case

The evidence adduced at trial was sufficient to warrant submitting the issue of municipal liability to the jury on each of three distinct theories. First, there was substantial evidence from which the jury could have inferred that the shooting of Tuttle under the circumstances of this case was authorized by city policy. Second, there was sharply conflicting evidence with regard to whether the shooting at issue had been caused by a city policy of inadequately training police officers. Third, there was similarly conflicting evidence regarding whether the city policy regarding the supervision of rookie officers had led to Tuttle's death.

(1) The defense theory in the district court, as we noted earlier, was that Rotramel's conduct was in every respect "reasonable, proper and legal." (J.A. 23). See pp. 7-10, *supra*. At trial officer Rotramel insisted that his shooting of Tuttle was entirely consistent with departmental rules requiring the "utmost discretion" in the use of his gun:

> Q. And you knew that you were to exercise the utmost discretion in the use of your weapon?

A. Yes, sir.

Q. And you really didn't exercise the utmost discretion in the use of your weapon, did you, sir?

A. Yes, I did.

* * *

Q. If you had to do it over, would you do it again?

A. Yes, sir I would have to.

Q. Without any hesitation?

A. Yes, sir.

Q. That's the way they trained you, isn't it?

A. I believe so.

(Tr. 587-88; J.A. 227). Former Police Chief Hagey,[41] who was the chief of police when Tuttle was killed, testified that Rotramel was authorized to use his gun if he believed, however mistakenly, that Tuttle was armed and dangerous:

Q. Would you shoot him?

A. I don't know.

Q. Would you be justified in shooting him?

A. If I thought my life was in danger, yes, sir.

Q. At that point and time and that hypothetical, would you be justified in shooting him?

A. Well, see, you're asking for somebody's answer, but I wasn't there. I don't know. I don't know what the officer felt at that time.

[41]The former chief's name is in fact spelled "Heggy"; for purposes of consistency with the Record, however, we use the incorrect spelling "Hagey" which occurs throughout the transcript.

(Tr. 418-19).[42] Other officers give conflicting testimony regarding whether they understood Rotramel was authorized to kill Tuttle under the circumstances of this case.[43]

There were similar conflicts regarding other possibly critical aspects of departmental policy. Captain Adams testified that officers were permitted to shoot without actually waiting to see if a suspect had a gun (Tr. 339); officer Routon insisted that officers were instructed not to shoot until they saw a gun. (Tr. 431). Chief Hagey stated it was city policy that where possible officers were to shoot to wound and thus "stop a person from doing what he intends to do" (Tr. 394); but another officer insisted police were only taught to shoot to kill, and Rotramel testified he never considered shooting to wound. (J.A. 162, 225). Officer Routon stated that officers were instructed never to shoot "if there is the slightest doubt" (Tr. 432); but Chief Hagey swore that officers were authorized to shoot even if there is "a certain amount of doubt." (Tr. 353).

In this Court petitioner, disregarding all of this testimony, relies exclusively on the section 9.03 of the police manual, which provides "a police officer is justified in using his firearm only in defense of life and instances where the suspect is armed and/or making an attempt to kill or do

[42]See also *id.* at 424:

"Q. Okay. Are you just telling this jury that if that officer thought he was going for a gun, he was entitled to shoot him and kill him dead?

A. I'm saying if the officer thought he was going for a gun, the officer had a right to stop him, yes."

[43]Tr. 144-46 (no), 160 (yes), 170 (no), 475 (probably not); J.A. 245-48 (no), 262-64 (probably not).

great bodily harm." (P.Br. 6, 19). Petitioner suggests that this section means that only a suspect who is *in fact* armed and dangerous may be shot, and that an officer would violate that policy if he used his weapon in a mistaken belief that his life was in danger. But neither Chief Hagey nor any other officer who testified understood or interpreted the written rules to impose such strict liability. Chief Hagey explained that Section 9.03 authorized police officers to kill "in defense obviously of their life or when they *believe* their life is threatened . . ." (Tr. 373) (emphasis added).[44] All the witnesses apparently agreed that city policy authorized the use of a firearm based on a mere belief that a suspect was armed and dangerous.

Petitioner's argument clearly illustrates the danger in construing city policy solely by reference to the cold letter of city manuals and memoranda, rather than by relying on actual practice and the understanding of city officials. *Monell* itself cautioned that actual practice was a "truer law than the dead words of the written text." 436 U.S. at 691 n.56. In *Monroe* v. *Pape* this Court noted that the Congress which framed Section 1983 was primarily concerned with abuses that had occurred under color of law but were not contained in "the state law on the books." 365 U.S. at 176; see also *id.* at 174-183. If the mere adoption of an empty rule forbidding an unconstitutional practice could conclusively establish the existence of a municipal policy, both *Monell* and *Monroe* would be a dead letter. See "Civil Rights Litigation after *Monell*," 79 *Col. L. Rev.* 213, 231-34

[44] *See also id.* 413 ("the officer has to have knowledge or believe that his life is threatened at that time.").

(1979). In this case the jury, although concluding that Rotramel had no reasonable basis for fearing that Tuttle would shoot him, was certainly entitled to credit the testimony of Chief Hagey and other witnesses that Rotramel's action was nonetheless authorized by city policy.

(2) A considerable portion of the trial was concerned with whether the killing of Tuttle was the result of inadequate training policies. As petitioner notes, Rotramel received the same training as all other cadets. (P.Br. 21). Petitioner acknowledged that the training program represented official policy, but insisted that the training was entirely adequate and had not caused the shooting at issue.

Much of the testimony supporting respondent's attack on petitioner's training policy was elicited from officer Rotramel himself in a deposition that was subsequently admitted into evidence . Rotramel repeatedly acknowledged that his training appeared to be inadequate.[45] Rotramel identified half a dozen areas in which he had never received

[45] J.A. 153:

"Q. Can you tell me under oath that you were adequately trained to handle that specific situation?

A. No."

J.A. 159:

"Q. Perhaps they didn't quite train you well enough in that situation, did they?

A. Perhaps."

J.A. 162-63:

"Q. So perhaps you weren't as well trained by your employer as you should have been in that specific situation, is that a fair statement?

A. Yes."

any training, including whether to wait for a backup unit,[46] how to handle an armed robbery call as a single officer,[47] how to enter a building in which an armed robbery might be taking place,[48] especially if the building had no windows,[49] how to apprehend a fleeing suspect,[50] and how to shoot a suspect so as to disable but not to kill him.[51] Rotramel conceded that, had he been given this training, Tuttle might well not have been killed.[52]

Respondent also relied on the testimony of an expert on police training and procedure, Dr. George Kirkham. Dr. Kirkham had experience in the training of officers in some 50 different law enforcement departments across the country, including the F.B.I., and was the author of a num-

---

[46]J.A. 147, 152, 153.

[47]J.A. 146.

[48]J.A. 146.

[49]J.A. 146, 152.

[50]J.A. 159, 164-65.

[51]J.A. 162.

[52]J.A. 163:

"Q. And if you would have been adequately trained that specific situation, Mr. Tuttle would be alive. . . .?

A. That's possible."

J.A. 165:

"Q. Do you think it would have been more probable that he would not have been shot if you would have had that adequate training?

A. It's possible.

Q. So your answer is yes.

A. Yes."

ber of the training manuals actually used by Oklahoma City Police Department. (J.A. 271-282). Kirkham characterized the city training program as "slipshod" (J.A. 288), and identified many of the same deficiencies in the training program that had been recognized by Rotramel himself, including the lack of training regarding waiting for a backup unit,[53] entry into a building in which a robbery was in progress,[54] and apprehension of a fleeing or dangerous suspect.[55] Kirkham emphasized that the Oklahoma City training program focused heavily on how to kill a suspect, with little consideration of how to investigate a crime without resorting to violence. That training program provided some 80 hours of practice on the firing range, but only 24 minutes of instruction concerning how to act at the scene of an armed robbery.[56] Kirkham explained:

> [O]f course its fine for officers to know the . . . mechanics of firearms use, but its also important for them to understand from the practical standpoint, the circumstances in which one uses firearms, . . . and these things apparently were not gotten across.

(J.A. 288). Kirkham concluded, as had Rotramel, that "[i]f he had been properly trained and supervised, the occurrence would not have taken place." (J.A. 301; see also J.A. 286, 288).

The city offered in response to this testimony evidence which, as petitioner's brief makes clear, might, if credited

---

[53]J.A. 286, 289, 291, 292, 301, 302.

[54]J.A. 286-91.

[55]J.A. 294, 300-01.

[56]J.A. 287-88, 302-04.

by the jury, have led to the conclusion that the city training policies had not caused the constitutional violation at issue. (P.Br. 6-7). But the direct conflicts in the evidence adduced by the parties, and the differing inferences that might have been drawn from that evidence, were matters for the jury's consideration.

The city urges that the evidence of inadequate training was "irrelevant," asserting that any defective training concerned only the time and manner in which officer Rotramel entered the bar (P.Br. 8). In fact both Rotramel and Kirkham noted that the city had failed to provide adequate training concerning the manner in which Rotramel should have acted after both he and Tuttle left the bar. In addition, as Kirkham noted, Rotramel's ill considered conduct prior to the actual shooting had needlessly placed Rotramel in a potentially dangerous situation and created the very ill founded fears which led to Tuttle's death. The jury, of course, was not obligated to find that the shooting was caused by any aspect of Rotramel's training, but the question of whether that training was in fact the cause of the shooting was an issue for the jury to resolve.

(3) There was a somewhat simpler conflict regarding whether the shooting of Tuttle was caused by the city's supervision policies. Chief Hagey testified that ideally a rookie cop should not be permitted to patrol alone in a squad car until he or she had at least 18 to 24 months experience on patrol with a senior officer. (Tr. 369-372). At one time the city had apparently enforced a rule that no rookie could be placed on solo patrol without at least one year of experience. (Tr. 199). At some undetermined time, however, that rule was relaxed because of a shortage of

manpower. As of 1980 rookie officers were permitted to patrol by themselves as soon as six months after they left the police academy. (Tr. 200). In this Court, as at trial, the city defends this practice as a method of saving money. (Tr. 206, 446; P.Br. 22).

Respondent contended that officer Rotramel should not have been permitted to drive alone in a squad car, not accompanied by a senior officer. In this regard the substance of city policy, which permitted rookies to patrol alone with less than one year of experience, was undisputed. The disagreement among the parties was limited to the question of whether that policy of putting rookies on the street without direct supervision had led to the shooting of Tuttle. Dr. Kirkham testified that Rotramel was too inexperienced to have been in a solo patrol car (J.A. 302), and that the resulting lack of direct supervision was cause of the killing which followed. (J.A. 301). The petitioner defended the six month policy, and offered testimony designed to show that that policy had not been a factor in Tuttle's death. The conflicting evidence regarding the issue of causation was a matter for the jury to resolve.

II. THE "QUESTION PRESENTED" BY PETITIONER IS NOT IN FACT PRESENTED BY THIS CASE.

The question presented framed by petitioner is as follows:

> Whether a single isolated incident of the use of excessive force by a police officer establishes an official policy or custom of a municipality sufficient to render the municipality liable in damages under 42 U.S.C. § 1983. (P.Br. i).

Read literally the issue thus cast is whether a plaintiff who proves no more than that he was the victim of one act of police brutality is entitled as a matter of law to a judgment against the officer's employer.

Petitioner's brief is devoted largely to a discussion of whether the mere existence of a constitutional violation would in every case not only permit but compel such a verdict. Thus at page 7 petitioner describes the issue as "whether a single isolated occurrence of the use of excessive or deadly force *results in* municipal liability under 42 U.S.C. § 1983." (Emphasis added). On page 8 the brief states, "The City of Oklahoma City asserts that the single act of Rotramel in shooting Tuttle . . . does not establish an 'official policy or custom' of Oklahoma City." And at page 14 petitioner relies on several lower court decisions which it characterizes as holding that "a single act or isolated incident is insufficient to establish municipal liability under § 1983."

Were the instant case one in which respondent had proved only that Tuttle was killed by an Oklahoma City police officer, and had failed to offer any direct proof of the

substance of city policies or the circumstances of the shooting, the question presented by petitioner would be of obvious relevance. But respondent offered far more evidence than merely that incident of excessive force; she adduced testimony directly bearing on the nature of city policies regarding training, supervision, and the use of firearms by police, as well as testimony that those policies had caused the killing of her husband. Both the certiorari petition and the brief for petitioner are cast in such a way as to suggest that no such evidence had ever been presented. With regard to the city's training policies, for example, petitioner argues:

> How can it seriously be contended that Oklahoma City had "an official policy or custom" of giving its police officers grossly inadequate training? Where is the proof that would support such a bazaar [sic] contention? Such proof does not exist. (P.Br. 21).

If this is an assertion that no witness ever testified that the city training policies were inadequate, it is simply false.

Petitioner argues persuasively against the notion that the mere occurrence of a single constitutional violation should invariably compel a finding of municipal liability. Such a rule would be inconsistent with both *Monell's* rejection of the doctrine of *respondeat superior*, and with the constitutionally protected prerogatives of civil juries. But the implausible doctrine which petitioner denounces had never been advanced by respondent, was not adopted by either court below, and is not presented by the record in this case.

III. *MONELL* DOES NOT REQUIRE THAT THE MUNICIPAL POLICY OR DECISION WHICH INJURED A PLAINTIFF HAVE ALSO INJURED OTHER INDIVIDUALS.

Petitioner appears to make in the alternative a second argument, that liability cannot be imposed under *Monell* unless a plaintiff proves the existence of a series of constitutional violations caused by the same offending policy or custom. Thus petitioner asserts that "a plaintiff should be required to submit probative evidence of a regular pattern of unconstitutional deprivation of citizen's rights before municipal liability can attach under § 1983." (P.Br. 17; see also *id.* at 22). Assuming, arguendo, that this contention is fairly encompassed within the question presented, it is clearly without merit.

Insofar as petitioner is arguing a plaintiff prove *both* the existence of a policy or custom *and* "a regular pattern of unconstitutional deprivation[s]," that argument is entirely inconsistent with the decision in *Monell*. *Monell* imposes liability for all official action or custom that causes a constitutional violation, and is not limited to actions or customs that happen to injure scores or hundreds of innocent victims. *Monell* expressly provided that an official "decision" would suffice to establish liability, although a single decision will often have only a single victim. 436 U.S. at 690. Section 1983 imposes liability on a defendant which inflicts a deprivation of constitutional rights on "any citizen of the United States or any other person," not on "a series of citizens" or "yet another person." The policy which served as the basis of municipal liability in *Owen* v. *City of Independence* was, to use petitioner's terminology, "a single

isolated" decision with "a single isolated" victim. Had the Oklahoma City council adopted an ordinance directing the summary execution of Mr. Tuttle, it is inconceivable that the city could have avoided liability under *Monell* by arguing that there was only one name on its hit list. Even an ongoing policy may, because of its particular nature, only result in occasional, although foreseeable, constitutional violations.

Even where a municipal policy is likely to injure a large number of victims, nothing in *Monell* requires that redress be denied to the early victims, or that injunctive relief be withheld until the body count or destruction of property has reached catastrophic proportions. If Oklahoma City were to adopt a policy of expelling all Catholics from the public schools, but was enjoined from implementing that policy after the first few expulsions, surely the success of that injunctive action would not preclude the actual victims of that short lived policy from obtaining compensatory relief. The doctrine advanced by petitioner would require an aggrieved plaintiff to base his or her claim in large measure on evidence that a defendant had violated the constitutional rights of a large number of unrelated third parties; ordinarily, however, a plaintiff is not permitted to "rest his claim to relief on the legal rights or interests of third parties," *Warth* v. *Seldin*, 442 U.S. 490, 499 (1975), and cannot vindicate in federal court a "generalized grievance" shared by a large class of citizens. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974).

Petitioner's contention is equally indefensible as a rule of evidence. Proof of a pattern of violations clearly cannot

be required where a plaintiff seeks to establish the existence of a decision, policy or custom that by its very nature had only a single victim, or which has as yet caused but a single injury. The existence of a pattern of violations, like the occurrence of a series of accidents with a piece of machinery, may indicate that existence of a common cause, *see Teamsters* v. *United States*, 431 U.S. 324, 349 (1977), but such a pattern is certainly not the only or necessarily the best way to establish the elements of causation or official action. Frequently, as here, a plaintiff will be able to rely on direct evidence of the causation and official action behind his or her injuries, rather than relying on the experiences of third parties. In this case the city might have augmented its defense with proof that such shootings had not occurred, and the plaintiff might have strengthened her case with proof of other shootings, but the absence of such arguably relevant evidence is not conclusive of the claims of either party.

In some cases, of course, a plaintiff will advance a theory of liability which by its own terms is based on a pattern of constitutional violations. The lower court cases relied on by petitioner are generally of this variety. If a plaintiff alleges the existence of a custom, proof of "persistent and widespread practices" is expressly contemplated by *Monell*. 436 U.S. at 691.[57] Where a plaintiff contends that his or her injury was caused by a failure to discipline government employees who earlier engaged in similar un-

[57]*Bennett* v. *City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (en banc); *Gilmore* v. *City of Atlanta*, 737 F.2d 894, 902, 904 (11th Cir. 1984); *Webster* v. *City of Houston*, 735 F.2d 838, 840, 842 (5th Cir. 1984).

consttutional conduct, both such prior conduct and a lack of disciplinary action will have to be shown.[58] Similarly, a claim that responsible supervisory officials failed to put a stop to a known pre-existing unconstitutional practice will require evidence of that earlier practice.[59] But in the instant case respondent's claim was not based on any theory which necessarily asserted the existence of any pattern of constitutional violations.[60]

Even in a case such as this, a defendant could urge the jury to discount the evidence adduced by plaintiff because there was no proof of "a regular pattern of unconstitutional deprivation[s]." A jury would be free to draw any reasonable inference it saw fit from the absence of such evidence. The arguments now advanced by petitioner, suggesting that this Court infer from that lack of such evidence that the city was without fault, are arguments that could and should have been made to the jury that heard this case and was responsible for drawing such inferences. Petitioner's trial counsel, however, apparently considered its "single incident" argument to be little more than a legal technicality by which to prevent submission of respondent's

[58]*Berry* v. *McLemore*, 670 F.2d 30, 32 (5th Cir. 1982); *Herrera* v. *Valentine*, 653 F.2d 1220, 1224-25 (8th Cir. 1981); *Turpin* v. *Mailet*, 619 F.2d 196, 202-03 (2d Cir. 1980); see also J.A. 58.

[59]*McClelland* v. *Facteau*, 610 F.2d 693, 697-98 (10th Cir. 1979); *Welington* v. *Daniels*, 717 F.2d 932, 937 (4th Cir. 1983).

[60]The decision in *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983), does appear to limit liability under *Monell* to policies and decisions that cause multiple violations. For the reasons set forth above, we urge that *Languirand* was wrongly decided.

claims to the jury; petitioner's counsel, either regarding the inferential force of this argument as unpersuasive, or recognizing that the existence of other evidence made the issue irrelevant, never bothered to urge the jury itself to draw any adverse inferences from the fact that respondent had proved only a "single isolated incident."

In any *Monell* action the nature and circumstances of the particular constitutional violation at issue will, as even petitioner appears to acknowledge, be relevant evidence with regard to the issues of causation, custom, or official action. The weight of such evidence will ordinarily be a matter of dispute. The trial judge properly referred to the jury the task of assessing the inferences from that and the rest of the evidence. At petitioner's urging the district court cautioned the jury not to give undue weight to the shooting of Tuttle in determining the existence of a city policy.[61] Although that cautionary instruction apparently fell short of what petitioner might have wished, petitioner failed to "state distinctly the matter to which [it] ob-

[61]The full instruction, the first portion of which is omitted in petitioners brief, was as follows:

> "Absent more evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, official policy such as to impose liability on the City of Oklahoma City under the federal Civil Rights Act cannot ordinarily be inferred from a single incident of illegality such as a first excessive use of force to stop a suspect; but a single, unusually excessive use of force may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge."

J.A. 44.

ject[ed] and the ground of [its] objection" as required by rule 51, Federal Rules of Civil Procedure.[62]

The instructions in this case, considered as a whole, were clearly correct. *See Castle* v. *Bullard*, 65 U.S. 172 (1859). The trial judge properly left to the jury the responsibility for deciding what inferences, if any, were to be drawn from the circumstances of the Tuttle shooting with regard to the cause of that tragic incident. Section 1983 was enacted against a background of tort law which clearly permitted a jury to draw such inferences in an appropriate case.[63] Nothing in *Monell* or the legislative history of section 1983 suggests any intent to strip federal juries of their established authority to decide whether or

[62]Counsel for petitioner stated, somewhat opaquely, "we make a second objection, your honor, particularly to the one, the Oklahoma City language, the language in the light of the City of Oklahoma City, which is the single occurrence language." (Tr. 693). While this appears to be a reference to the instruction quoted in note 61, *supra*, it is less clear which portion of the instruction was regarded as objectionable. More seriously, the quoted objection simply contained no explanation of the ground of petitioner's objection, and thus was not "sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943). Even in this Court the nature of petitioner's contentions remains less than clear.

[63]Chief Justice Erle observed in 1865:

> "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant . . . and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence . . . that the accident arose from want of care."

Scott v. *London & St. Katherine Docks Co.*, 3 H. & C. 596, 159, Eng. Rep. 665 (1865). Certainly it is possible that the specific circumstances of a particular constitutional violation may be "such as in the ordinary

not the specific circumstances of an injury warranted any conclusions as to its cause. See *Scheuer* v. *Rhodes*, 416 U.S. 232, 243-44 (1974).

Since this is not a case in which plaintiff introduced no evidence other than proof of a constitutional violation, any erroneous implications in the instruction with regard to such a case was irrelevant. *Hopper* v. *Evans*, 456 U.S. 605 (1982). Here neither counsel referred in his opening or closing statements to any inferences that might be drawn from the Tuttle killing itself, and the jury's decision regarding official action and causation was doubtless based on the substantial direct evidence adduced with regard to those issues. Under these circumstances, the trial court's instructions regarding any inference to be drawn from the Tuttle killing could have had no more than "an inconsequential impact on the jury's decision regarding" municipality. *Zant* v. *Stephens*, 77 L.Ed.2d 235, 257 (1983).

Petitioner closes its brief with a plea that this Court consider "the citizens of the municipality, who bear the financial burden of the judgment through taxation." (P.Br. 22). But the verdict of which petitioner here complains was rendered by those very taxpayers, men and women who were certainly aware of the ultimate source of municipal funds, but who may have been more concerned about the dangers they faced if the city failed to improve its

---

[23] (Continued)

course of things do not happen" except as a result of governmental policies. *See Turpin* v. *Mailet*, 619 F.2d 196, 202 (2d Cir. 1980); *Owens* v. *Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979), *cert. denied, sub. nom. County of Nassau* v. *Owens*, 444 U.S. 980 (1979). Whether a particular cas presents such circumstances is a matter for the jury.

training and supervision policies. Petitioner contended at trial that it had done all that could reasonably be asked to guide its police officers in the use of deadly force; the jury found otherwise. Petitioner now urges that by overturning that verdict, rendered by a jury selected from a cross section of Oklahomans, this Court would somehow vindicate "the theory that the people are the ultimate sovereign." (P.Br. 22). The logic of this argument is far from apparent. In finding for respondent, the members of the jury placed the community's interest in the vigorous enforcement of the Constitution ahead of the city's interest in saving money. That is precisely the choice which the framers of the Seventh Amendment contemplated would occur, and it is a choice with which this Court should not interfere.

CONCLUSION

For the foregoing reasons the decision of the court of appeals should be affirmed.

Respectfully submitted,

CARL HUGHES*
MICHAEL GASSAWAY
Hughes, Nelson & Gassaway
1501 N. Classen, Suite 200
Oklahoma City, Oklahoma 73106
(405) 528-2300

Attorneys for Respondent

Of Counsel:

J. LEVONNE CHAMBERS
ERIC SCHNAPPER
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

December, 1984

No. 83-1919

Office - Supreme Court, U.S.
FILED
DEC 15 1984
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF OKLAHOMA CITY,

Petitioner,

—v.—

ROSE MARIE TUTTLE,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

DON ED PAYNE
American Civil Liberties
Union of Oklahoma Foundation
P. O. Box 785
Hugo, Oklahoma 74743
(405) 326-6453

December 15, 1984

TABLE OF CONTENTS

Pages

INTEREST OF AMICI CURIAE.....1

INTRODUCTION AND SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

I. A Municipality May Be Found Liable Under 42 U.S.C. § 1983 For Constitutional Violations Caused By The Municipality's Custom of Providing Inadequate Training And Supervision of' Its Police Force.....4

A. A Plaintiff Need Not Prove a Pattern of Prior Similar Violations.....5

B. Municipal Liability in This Case Will Not Lead to Strict Liability Against Municipalities.....27

II. A Rule Barring Municipal Liability For Inadequate Training and Supervision Resulting in a Single Incident of Official Misconduct Would Eviscerate The Compensatory and Deterrent Goals of 42 U.S.C. § 1983.....31

A. The Legislative History of § 1983 Evinces Congressional Intent to Impose Liability on Municipalities Not Only for Affirmative Harms, But Also for Failure to Act to Protect the Constitutional Rights of Citizens.....31

B. The Compensatory and Deterrent Functions of § 1983 Require Municipal Liability Under the Circumstances of this Case.....35

C. A Municipality Is In The Best Position To Evaluate The Costs and Benefits of Additional Police Training and Supervision.....45

CONCLUSION.....49

TABLE OF AUTHORITIES

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).....3, 6, 13, 14

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962).....22

Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).....29

Baker v. McCollan, 443 U.S. 137 (1979).....28

Batista v. Rodriguez, 702 F.2d 393 (2d Cir. 1983).....8

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir.) (en banc), petition for reh'g denied per curiam, 735 F.2d 863 (5th Cir. 1984) (en banc), petition for cert. filed, 53 U.S.L.W. 3419 (U.S. Sept. 14, 1984).....9, 12

Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982).....10

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....38

Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982).....23

Bose Corp. v. Consumers Union,
80 L.Ed.2d 502 (1984).....23

Butz v. Economou,
438 U.S. 478 (1978).....38

Carey v. Piphus,
435 U.S. 247 (1978).....36, 38, 40

Carlson v. Green,
446 U.S. 14 (1980).....40

Continental Oil Co. v. Union
Carbide & Carbon Corp.,
370 U.S. 690 (1962).....22

Doe v. New York City Department
of Social Services,
709 F.2d 782 (2d Cir.),
cert. denied,
104 S. Ct. 195 (1983).....20

Estelle v. Gamble,
429 U.S. 97 (1976).....29

Gilmere v. City of Atlanta,
737 F.2d 894 (11th Cir. 1984).....29

Hahn v. Atlantic Richfield Co.,
625 F.2d 1095 (3d Cir. 1980),
cert. denied,
450 U.S. 981 (1981).....22

Hardeman v. Clark,
593 F. Supp. 1285 (D.D.C. 1984).....8

Harlow v. Fitzgerald,
457 U.S. 800 (1982).....26, 44

Hays v. Jefferson County,
668 F.2d 869 (6th Cir.),
cert. denied,
459 U.S. 833 (1982).....8, 29

Herrera v. Valentine,
653 F.2d 1220 (8th Cir. 1981).....8, 20

Hill v. Marinelli,
555 F. Supp. 413 (N.D. Ill. 1982).....8

Imbler v. Pachtman,
424 U.S. 409 (1976).....40, 44

Independence Tube Corp. v.
Copperweld Corp.,
691 F.2d 310 (7th Cir. 1982),
rev'd, 81 L.Ed.2d 628 (1984).....22, 24

Iskander v. Village of
Forest Park,
690 F.2d 126 (7th Cir. 1982).....20

Languirand v. Hayden,
717 F.2d 220 (5th Cir. 1983),
cert. denied,
104 S. Ct. 2656 (1984).....11

Lavender v. Kurn,
327 U.S. 645 (1946).....22

Leite v. City of Providence,
463 F. Supp. 585 (D.R.I. 1978).....9, 29

Lenard v. Argento,
699 F.2d 874 (7th Cir.),
cert. denied,
104 S. Ct. 69 (1983).....11

Littlefield v. Deland,
641 F.2d 729 (10th Cir. 1981).....8

Loehr v. Offshore Logistics, Inc.,
691 F.2d 758 (5th Cir. 1982).....24

Lombard v. Louisiana,
373 U.S. 267 (1963).....13

Los Angeles v. Lyons,
75 L.Ed.2d 675 (1983).....43

Marbury v. Madison,
1 Cranch 137 (1803).....44

Monell v. Department of
Social Services,
436 U.S. 658 (1978).....passim

Monell v. Department of
Social Services,
532 F.2d 259 (2d Cir. 1976),
rev'd, 436 U.S. 658 (1978).....5

Monroe v. Pape,
365 U.S. 167 (1961).....4, 32, 33

Nashville, Chattanooga & St. Louis
Railway Co. v. Browning,
310 U.S. 362 (1940).....13

New York Central & Hudson
River Railroad Co. v. Fraloff,
100 U.S. 24, 25 L.Ed. 531 (1879).....24

Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981).....5, 17, 40, 43

Nunez v. Superior Oil Co.,
572 F.2d 1119 (5th Cir. 1978),
aff'd following remand,
644 F.2d 534 (5th Cir. 1981).....24

Owen v. City of Independence,
445 U.S. 622 (1980).....passim

Owens v. Haas,
601 F.2d 1242 (2d Cir.),
cert. denied,
444 U.S. 980 (1979).....8, 9, 29

Parratt v. Taylor,
451 U.S. 527 (1981).....28

Peterman v. Chicago, Rhode Island
& Pacific Railroad Co.,
516 F.2d 328 (8th Cir.),
cert. denied,
423 U.S. 869 (1975).....23

Pierson v. Ray,
386 U.S. 547 (1967).....44

Polk County v. Dodson,
454 U.S. 312 (1981).....5

Popow v. City of Margate,
476 F. Supp. 1237 (D.N.J. 1979).....9

Powe v. City of Chicago,
664 F.2d 639 (7th Cir. 1981).....8

Pullman-Standard v. Swint,
456 U.S. 273 (1982).....23

Rizzo v. Goode,
423 U.S. 362 (1976).....15, 16, 48

Robertson v. Wegmann,
436 U.S. 584 (1978).....36, 37, 40

Rogers v. Lodge,
458 U.S. 613 (1982).....7

Samuels v. Health & Hospitals Corp., 591 F.2d 195 (2d Cir. 1979).....23

Smith v. Wade, 75 L.Ed.2d 632 (1983).....31

Thurman v. City of Torrington, 53 U.S.L.W. 2246 (D. Conn. Oct. 23, 1984).....8

Turpin v. Mailet, 619 F.2d 196 (2d Cir.), cert. denied, 449 U.S. 1016 (1980).....9, 20, 29

Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir. 1984), cert. granted, 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984).....9

United States v. Johnson, 457 U.S. 537 (1982).....41

United States v. United States Gypsum Co., 333 U.S. 364 (1948).....23

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).....7

Washington v. Davis, 426 U.S. 229 (1976).....7

Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982), petition for reh'g en banc granted, 711 F.2d 35 (5th Cir. 1983), vacated and remanded per curiam, 735 F.2d 838 (5th Cir.) (en banc), aff'd in part, rev'd in part, and remanded per curiam, 739 F.2d 993 (5th Cir. 1984) (on petition for en banc rehearing).....6, 10, 12, 42

Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983).....11, 29

Statutes

Act of April 20, 1871, Ch. 22, 17 Stat. 13 (1871) (now codified as 42 U.S.C. § 1983).....32

18 U.S.C. § 241.....43

18 U.S.C. § 242.....43

18 U.S.C. § 245.....43

Federal Rules of Civil Procedure Rule 52(a).....23

42 U.S.C. § 1983.....passim

Legislative Material

Congressional Globe,
42d Cong., 1st Sess. (1871).....33, 34, 35

Congressional Globe Appendix,
42d Cong., 1st Sess. (1871).....34, 35

Other Authorities

G. Calabresi, The Costs of Accidents (1970).....45

Calabresi & Hirschoff, Toward a Test for Strict Liability in Tort, 81 Yale L.J. 1055 (1972).....45

Developments, Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977).....35

5A Moore's Federal Practice
¶ 50.07[2] (1984).....22

J.O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damages Remedy for Law Enforcers' Misconduct,
87 Yale L.J. 447 (1978).....37, 46

Note, Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"
79 Colum. L. Rev. 304 (1979).....35

Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases,
57 Wash. L. Rev. 635 (1982).....47

Posner, Rethinking the Fourth Amendment,
1981 S. Ct. Rev. 49.....47

Schnapper, Civil Rights Litigation After Monell,
79 Colum. L. Rev. 213 (1979).....40

P. Schuck, Suing Government (1983).....46, 48

9 Wright & Miller, Federal Practice & Procedure § 2558 (1971 & Supp. 1984).....20

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The American Civil Liberties Union of Oklahoma Foundation is one of its state affiliates.

The American Civil Liberties Union has long worked to defend basic constitutional rights, and in so doing, has in recent years filed briefs, as counsel for a party or as amicus curiae, in many cases that required construction of the statute, 42 U.S.C. § 1983, at issue in this case. With the consent of the parties, indicated by letters we have lodged with the Clerk of this Court, we file this brief amici curiae to bring our experience to bear on the important questions presented by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is well-settled that a municipality may be liable under 42 U.S.C. § 1983 for federal constitutional violations caused by a formal, written municipal policy or by decisions of policymaking officials. It is equally well-settled that a municipality may not be liable under § 1983 on a respondeat superior theory. This case presents the intermediate issue of whether a municipality may be liable under § 1983 when a properly charged jury finds, upon reviewing extensive evidence, that a municipal custom of patently inadequate training and supervision of the police force caused the death of plaintiff's husband. Oklahoma City's custom consisted of police training and supervision so grossly negligent or reckless as to amount to deliberate indifference to the likely consequences: constitutional violations and fatal injuries.

In its simplest form, this case concerns whether the shooting of Mr. Tuttle may be fairly traceable to the city rather than to a street-level police officer. Amici curiae maintain that the presence of a city custom of grossly negligent training and supervision provides the necessary causal link between the city and the constitutional violation.

A plaintiff alleging a constitutional violation caused by a municipal policy or custom need not prove a pattern of similar prior incidents. This Court has already directly held that a § 1983 plaintiff may prove a custom absent evidence of a pattern of similar prior incidents. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 173 (1970). A § 1983 plaintiff can prove that a "policy or custom" caused an injury without having simultaneously to try a handful of police brutality cases concerning similar incidents. Nor need many citizens of a city

be shot to death by rookie police officers who had received grossly negligent training and supervision before the survivors of one victim may hold the city liable for damages.

ARGUMENT

I. A Municipality May Be Found Liable Under 42 U.S.C. § 1983 For Constitutional Violations Caused By The Municipality's Custom of Providing Inadequate Training And Supervision of Its Police Force.

In Monell v. Department of Social Services, 436 U.S. 658 (1978), this Court reversed its earlier holding in Monroe v. Pape, 365 U.S. 167 (1961), and held that municipalities could be liable under 42 U.S.C. § 1983. While Monell clearly required a § 1983 plaintiff alleging municipal liability to prove that a municipal policy or custom violated plaintiff's federal rights and caused an injury, 436 U.S. at 691, Monell did not trace the "full contours of municipal liability under § 1983." Id. at 695. Monell and subsequent decisions of this Court have

not defined the quantum and nature of proof necessary to prove a policy or custom based on a failure to act; nor has the Court defined the requisite causal nexus between a municipality's "policy or custom" and plaintiff's injury, beyond holding that a policy or custom must be "the moving force" behind the constitutional violation. Polk County v. Dodson, 454 U.S. 312, 326 (1981).

A. A Plaintiff Need Not Prove a Pattern of Prior Similar Violations.

A municipal policy or custom may take many forms and therefore can be established by different types of proof. A policy may be formal and written.[1] It may be a decision adopted and promulgated by the municipality's policymakers.[2] A custom may be found even

---

[1] E.g., Monell, 436 U.S. at 694-95; Monell v. Department of Social Services, 532 F.2d 259, 260 (2d Cir. 1976) (challenge to "rules and regulations" of city agencies).

[2] E.g., Newport v. Fact Concerts, Inc., 453 U.S. 247, 251-52 (1981); Owen v. City of Independence, 445 U.S. [cont'd. on next pg]

though the custom had not received formal approval through the municipality's official decisionmaking channels.[3] A custom is formed by the well-established, routine behavior of municipal employees or officials who act with the tacit approval of municipal policymakers.[4]

No municipality today would openly adopt a policy authorizing its police officers to use unconstitutionally excessive force against persons. Even those police departments and officials that might still condone or encourage violent police misconduct have become sufficiently sensitive to the operation of our judicial system that

---

622, 625-30 (1980).

[3] Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970); see Monell, 436 U.S. at 690-91.

[4] Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.) (en banc) (per curiam) (defining municipal "custom" for § 1983 purposes), aff'd in part, rev'd in part, and remanded per curiam, 739 F.2d 993 (5th Cir. 1984) (on petition for en banc reh'g).

they do not openly advocate such behavior. Given that no formal policy will exist in such circumstances, liability will hinge on the existence of an unofficial, and more difficult to prove, custom.[5] Thus, proof that a municipal custom of malign neglect caused a constitutional violation will almost always depend on indirect, circumstantial evidence.[6] Many lower courts have therefore adopted a flexible approach to the problem of proof in such cases. These courts generally permit an inference that a municipal custom caused plaintiff's injury based on either

---

[5] While "custom" and "causation" are theoretically distinct elements of municipal liability, proof of these elements in "failure to train" cases often involves similar evidence, including police department screening, hiring, and training of new officers, and the supervision and discipline of field officers.

[6] This Court has often adverted to the value of evidence of effect as an indirect means of proving unlawful purpose. See, e.g., Rogers v. Lodge, 458 U.S. 613, 618 (1982); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

(1) municipal inaction in the face of a pattern of prior, similar incidents,[7] or (2) a single injurious incident plus evidence warranting a jury finding that deliberate indifference to adequate hiring, training, or supervision of the police force caused the injury.[8] The present action falls into the

[7] E.g., Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983) (persistent failure to discipline police officers who violated civil rights); Powe v. City of Chicago, 664 F.2d 639, 643, 650-51 (7th Cir. 1981) (four erroneous arrests of same person based on same defective warrant); Herrera v. Valentine, 653 F.2d 1220, 1225 (8th Cir. 1981) (city authorities aware of continuing police misconduct); Littlefield v. Deland, 641 F.2d 729, 732 (10th Cir. 1981) (pattern of prolonged detentions of mentally disturbed prisoners in strip cell); Thurman v. City of Torrington, 53 U.S.L.W. 2246 (D. Conn. Oct. 23, 1984) (police consistently provided less protection for victims assaulted by husbands or boyfriends).

[8] E.g., Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir.) (municipality may be liable for reckless or grossly negligent police training), cert. denied, 459 U.S. 833 (1982); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.) (county may be liable for beating of prisoner if failure to train or supervise prison guards constituted gross negligence or deliberate indifference to prisoner's constitutional rights), cert. denied, 444 U.S. 980 (1979); Hardeman v. Clark, 593 F. Supp. 1285, 1287 (D.D.C. 1984) (District of Columbia may be liable for inadeqate procedures for police training and reprimand); Hill v. Marinelli, 555 [cont'd. on next pg]

latter category.

Contrary to the city's contention, City Brief 7-9, this action is not an attempt to impose a pure form of "single-incident" liability on Oklahoma City (the city) for an isolated incident of police brutality with no link to Oklahoma City police department policy or custom.[9] Nor is this an attempt to

F. Supp. 413, 416 (N.D. Ill. 1982) (grossly negligent police training); Popow v. City of Margate, 476 F. Supp. 1237, 1245-46 (D.N.J. 1979) (city may be liable where failure to train, supervise or discipline police officers is reckless or grossly negligent); Leite v. City of Providence, 463 F. Supp. 585, 590-91 (D.R.I. 1978) (pattern of past police misconduct not required; city may be liable if training or supervision is so deficient that misconduct and resulting harm are almost inevitable).

[9] While a single incident itself might be so brutal and egregious as to permit an inference that the failure of policymaking officials to take precautions against such action represented deliberate indifference to the consequences, e.g., Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir.), cert. denied, 449 U.S. 1016 (1980); Owens v. Haas, 601 F.2d 1242, 1246-47 (2d Cir.), cert. denied, 444 U.S. 980 (1979); Leite v. City of Providence, 463 F. Supp. 585, 590-91 (D.R.I. 1978), a single incident alone usually will not suffice to establish the requisite degree of culpability for supervisory inaction upon which to predicate municipal liability under § 1983. See, e.g., Bennett v. City of Slidell, 728 F.2d 762, 768 [cont'd. on next pg]

prove a custom through nothing more than the behavior of street-level police officers,[10] without any evidence concerning departmental programs. Rather, Tuttle introduced "extensive evidence" proving the grossly inadequate training afforded all police officers in Oklahoma City. Tuttle v. City of Oklahoma City, 728 F.2d 456, 459-61 (10th Cir. 1984); Jt. App. 67-71. Tuttle also showed that the city had a well-established

---

(5th Cir.) (en banc) (single instance of unequal enforcement of city building code establishes no city custom), petition for reh'g denied per curiam, 735 F.2d 863 (5th Cir. 1984) (en banc), petition for cert. filed, 53 U.S.L.W. 3419 (U.S. Sept. 14, 1984); Berry v. McLemore, 670 F.2d 30, 32-33 (5th Cir. 1982) (isolated decision not to discipline police officer did not prove city policy or custom). However, the Court need not address the propriety of single-incident liability in this case; the evidence here went far beyond the incident itself.

[10] See Webster v. City of Houston, 735 F.2d 838, 842 (5th Cir.) (en banc) (per curiam) (for city employees' actions alone to prove a city custom, those actions must have recurred often), aff'd in part, rev'd in part, and remanded per curiam, 739 F.2d 993 (5th Cir. 1984) (on petition for en banc reh'g) (affirming judgment of liability against city).

custom of permitting rookie officers to patrol, and to respond to suspected armed robberies, alone.[11]

The fatal shooting of William Tuttle plus the grossly inadequate training and supervision of the Oklahoma City police force provided ample evidence to support the jury's finding that a city custom caused the constitutional violation. The few courts that have rejected the sufficiency of such evidence, and have instead required proof of a pattern of similar incidents,[12] are simply

---

[11] Testimony of Oklahoma City Police Captain Richard Delaughter, Trial Transcript 198-200, 206.

[12] E.g., Languirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983), cert. denied, 104 S. Ct. 2656 (1984); Lenard v. Argento, 699 F.2d 874, 886 (7th Cir.), cert. denied, 104 S. Ct. 69 (1983); see also Wellington v. Daniels, 717 F.2d 932, 935-56 (4th Cir. 1983) ("Generally, a failure to supervise gives rise to § 1983 liability ... only in those situations in which there is a history of widespread abuse.").

The Fifth Circuit en banc recently qualified its Languirand holding (on which the city's brief relies heavily, Brief at 11-13), by distinguishing between "occasional acts of untrained policemen not otherwise attributed to city policy or custom" (which are not actionable), and "police recruitment and training that [cont'd. on next pg]

wrong. A pattern of injuries is a sufficient, but not a necessary predicate for municipal liability.[13] The city's argument for a "pattern" requirement, see City Brief 17, 22, would arbitrarily restrict plaintiffs trying to prove the existence of an unwritten, informal custom to a single method of proof.

The city's argument finds no support in this Court's decisions. In Monell, this Court held that municipalities "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though

---

is itself unconstitutional and injurious," (which is actionable). Bennett v. City of Slidell, 728 F.2d at 768 n. 3. The Fifth Circuit en banc also recently set out a general formula for a municipal custom. While this formula does require "[a] persistent, widespread practice of city officials or employees," it does not require a pattern of injurious incidents. See Webster v. City of Houston, 735 F.2d at 841. A "persistent, widespread practice" of clearly deficient training would appear to satisfy the Fifth Circuit's formula for municipal liability.

[13] See cases cited supra note 7.

such a custom has not received formal approval through the body's official decisionmaking channels.... 'Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.'" 436 U.S. at 690-91 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)); see Nashville, Chattanooga & St. Louis Railway Co. v. Browning, 310 U.S. 362, 369 (1940) ("Settled state practice ... can establish what is state law.... Deeply embedded traditional ways of carrying out state policy ... are often tougher and truer law than the dead words of the written text.") (quoted in Monell, 436 U.S. at 691 n. 56).[14]

---

[14] Cf. Lombard v. Louisiana, 373 U.S. 267, 273 (1963) (city may act as authoritatively through its executive as through its legislative body).

In Adickes, a suit brought under § 1983 for an alleged equal protection violation, the court concluded that a private restaurant, acting in concert with local police officials, had a "custom" of not serving white persons in the company of black persons. In so holding, the Court reversed the Second Circuit, which had affirmed a directed verdict for the restaurant on the grounds that plaintiff had failed to show other instances of a refusal to serve white persons in mixed-race groups. 398 U.S. at 173.[15] Thus, this Court held that the Adickes plaintiff could prove a "custom" under § 1983 without having to show a pattern of past similar abuse.

[15] Of course, plaintiff could not have shown at her 1964 trial that the restaurant had a long-standing policy of serving only the blacks in an integrated group, because until shortly before that time blacks could not have obtained service at all. 398 U.S. at 173.

This Court's ruling in Rizzo v. Goode, 423 U.S. 362 (1976), provides no support for the city's argument that Tuttle does not have a valid cause of action against the city under § 1983. In Rizzo, this Court reversed a judgment that had provided injunctive relief against the top officials of the Philadelphia police department in the wake of a series of reported incidents of excessive use of force against city residents.

The Rizzo Court emphasized the absence from plaintiffs' proof of any affirmative link between their injuries and any plan or policy of the city's officials. 423 U.S. at 371. In Monell, this Court explained that the causal connection missing in Rizzo could be supplied by proof of a failure to train or to supervise police officers: "By our decision in Rizzo v. Goode, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control

or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." Monell, 436 U.S. at 694 n. 58 (emphasis added). This passage implies that either an affirmative exercise of control or a failure to train or to supervise could justify municipal liability.

Beyond the Monell Court's use of Rizzo in the context of municipal liability, Rizzo has little precedential value for the present case. In reversing the Rizzo lower courts, this Court focused on plaintiffs' lack of standing, on a federal court's limited power to grant the equitable relief sought, and on related values of federalism. All of these concerns dissipate where, as here, plaintiff seeks monetary rather than injunctive relief.[16]

[16] In addition, Rizzo concerned official, not municipal, liability. 423 U.S. at 365 n. 1, 367. In the pre-Monell world in which this Court decided [cont'd. on next pg]

To be sure, a municipality's failure to act can only constitute deliberate indifference to constitutional violations if the municipality knew or had reason to know that such violations were likely to occur were preventive measures not taken. But it does not follow that a municipality can acquire such knowledge, actual or constructive, only from a pattern of similar incidents. The city in effect presses the astounding proposition that there is but one way to put a municipality on notice of likely impending violations. But a municipality may

Rizzo, municipalities were not liable under § 1983. Since Monell, this Court has established distinct and separate standards of liability for municipalities and municipal officials. Officials may assert the defense of qualified immunity; municipalities may not. Owen v. City of Independence, supra. Officials may be liable for punitive damages; municipalities may not. Newport v. Fact Concerts, Inc., supra. The evolution of divergent schemes of liability for officials and municipalities, based on legislative history and public policy, cautions against the broad application of Rizzo and other official liability decisions in the present context.

have notice even absent a pattern of actual prior incidents. Granted, official inaction in the face of a pattern of brutal slayings would be highly probative of tacit approval of a subordinate's unconstitutional behavior. But official inaction to improve a grossly deficient training program that had not yet resulted in any harm could, under proper circumstances, also indicate tacit approval of the constitutional violations that would likely result. Surely a court cannot determine as a matter of law in advance of any factual presentation that no program of training and supervision could be so deficient as to support an inference that policymaking officials were deliberately indifferent to the inevitable results of inadequately training or supervising the police force.

For instance, suppose a police department, in full compliance with its

screening and hiring policy, hires a white police officer with a known record of convictions for violent crimes and known racist beliefs. The department gives the new officer no training or guidance, arms him, and sends him on patrol alone in a black neighborhood. He shoots and kills an unarmed black youth who runs from the officer when asked for identification. Given such facts, could this Court say that no reasonable juror could find that a city custom caused -- was the "moving force" behind -- a denial of the victim's constitutional rights?

If the Court agrees that in this hypothetical "failure to train" case a jury could find for plaintiff against the municipality, then the existence of a municipal custom in the instant case, in which plaintiff Tuttle presented extensive evidence of the city's failure adequately to train or to supervise its police officers,

becomes a question of fact for the jury, properly charged, to decide.[17] The district court's instructions, read as a whole,[18] correctly informed the jury concerning municipal liability. The court explained that the city could not be liable on a respondeat superior basis; that the city could be liable only if a city policy proximately caused a constitutional violation; that a city policy or custom could cause a deprivation of rights if the jury found that the city implicitly or tacitly authorized, sanctioned, ratified, or acquiesced in the deprivation; and that the existence of a policy could be inferred from the acts or omissions of supervisory officials if those omissions amounted to deliberate indifference to constitutional rights or tacit approval of constitutional violations.[19]

The jury decided for Tuttle. Given that the district court's instructions accurately portrayed the controlling law and that the record contained ample evidence to support the verdict, the district court properly denied the city's motions for a directed verdict and for a judgment notwithstanding the verdict.[20] Appellate review of a

---

[17] See Iskander v. Village of Forest Park, 690 F.2d 126, 129 (7th Cir. 1982) (whether police had custom of strip-searching suspects in semi-public room was question of fact for jury); Herrera v. Valentine, 653 F.2d at 1224 n. 2 (appellate court may not substitute its judgment for that of the jury concerning ultimate finding of municipal liability). But see Turpin v. Mailet, 619 F.2d at 203 (reversing jury verdict against city in "failure to discipline" case).

[18] The city's misleading quotation, Brief at 8-9, of less than a single sentence of the district court's lengthy instructions, Jt. App. 25-54, flouts the fundamental rule of appellate review that jury instructions are to be evaluated as a whole. See 9 Wright & Miller, Federal Practice & Procedure § 2558, at 668 (1971 & Supp. 1984).

[19] The opinion below quoted the relevant portions of the district court's instructions. 728 F.2d at 460; Jt. App. 68-69. The full instructions are reprinted at Jt. App. 25-54.

[20] Cf. Doe v. New York City Department of Social Services, 709 F.2d 782, 791-92 (2d Cir.) (reversing [cont'd. on next pg]

district court's denial of a motion for judgment notwithstanding the verdict is severely limited. Reviewing courts must view the evidence in the light most favorable to the party that prevailed before the jury, giving the benefit of all favorable inferences to that party. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696-97 & n. 6 (1962); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 358-59 (1962); Lavender v. Kurn, 327 U.S. 645, 652-53 (1946); 5A Moore's Federal Practice ¶ 50.07[2], at 50-79 to 50-84 (1984).[21]

---

district court's grant of judgment n.o.v. to defendant, the city's child placement agency, because there was more than sufficient evidence of agency's deliberate indifference in failing to supervise plaintiff child's placement in foster home where she had been sexually abused), cert. denied, 104 S. Ct. 195 (1983).

[21] See Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 319-20 & n. 14 (7th Cir. 1982), rev'd on other grounds, 81 L.Ed.2d 628 (1984); Hahn v. Atlantic
[cont'd. on next pg]

Following bench trials, this Court has repeatedly invoked Rule 52(a) of the Federal Rules of Civil Procedure in stating that the factual findings of district courts sitting without a jury may be reversed only if "clearly erroneous." See, e.g., Bose Corp. v. Consumers Union, 80 L.Ed.2d 502, 515 (1984) (citing cases); Pullman-Standard v. Swint, 456 U.S. 273, 287-90 (1982); United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).[22] Given the command of

---

Richfield Co., 625 F.2d 1095, 1099 (3d Cir. 1980), cert. denied, 450 U.S. 981 (1981); Samuels v. Health & Hospitals Corp., 591 F.2d 195, 198 (2d Cir. 1979); Peterman v. Chicago, Rock Island & Pacific Railroad Co., 516 F.2d 328, 330 (8th Cir.), cert. denied, 423 U.S. 869 (1975).

As the Third Circuit stated in an appeal from a jury verdict for plaintiffs in another § 1983 municipal liability case, the appellate court should uphold a jury verdict unless the record is "critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief." Black v. Stephens, 662 F.2d 181, 187 (3d Cir. 1981) (quoting cases), cert. denied, 455 U.S. 1008 (1982).

[22] The holding in the Bose case that constitutional considerations in public-figure libel cases require de novo appellate review in derogation of Rule 52(a)'s clear meaning is inapposite here. The city has made
[cont'd. on next pg]

the Seventh Amendment and the historic role of the jury, a jury's verdict is entitled to even greater appellate deference than is a trial court's findings of fact. See Loehr v. Offshore Logistics, Inc., 691 F.2d 758, 760 & n. 3 (5th Cir. 1982); Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 n. 6 (5th Cir. 1978), aff'd following remand, 644 F.2d 534 (5th Cir. 1981).[23] Jury fact-finding, unlike judicial fact-finding, is not subject to direct attack as "clearly erroneous." Independence Tube Corp. v. Copperweld Corp., 691 F.2d at 319.

---

no claim that constitutional (or any other) factors mandate a departure from normal deference to the findings of the trier of fact.

[23] See also New York Central & Hudson River Railroad Co. v. Fraloff, 100 U.S. 24, 25 L.Ed. 531, 535 (1879) ("[This Court's] power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.") (citing cases).

The absolute rule advocated by the city would contravene an essential element of the scheme of municipal liability under § 1983 that has evolved since Monell. A rule requiring a pattern of similar incidents to sustain municipal liability for failure to act would provide a municipality with a form of qualified immunity, which this Court expressly rejected in Owen v. City of Independence, 445 U.S. 622 (1980). The city's argument reduces to a claim that a municipality can be held liable for failing to take action only in those cases in which the need for action was clearly necessary to prevent continued repetition of demonstrated harms. The city's reading of § 1983 would insulate a municipality from liability even if its policymakers had reason to believe (based on a clearly deficient plan for training or supervision) that constitutional

violations and grave harm were inevitable absent ameliorative measures.[24] Despite Owen, the city would thus grant to municipal defendants in "failure to train" cases even greater immunity from § 1983 liability than this Court has granted to official defendants in § 1983 actions. This Court's test for the qualified immunity of government officials permits a civil damages remedy against government officials performing discretionary functions only insofar as their conduct violates "clearly established ... constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).[25] The

[24] For instance, the city's construction of § 1983 would deny liability even if the city had received an emergency warning from a national commission responsible for evaluating police training programs.

[25] While Harlow addressed the qualified immunity of federal officials sued directly under the Constitution, the Harlow formulation applies as well in suits against state and local officials under § 1983. See Harlow v. Fitzgerald, 457 U.S. at 818 n. 30.

city's interpretation of § 1983 would bar municipal liability under circumstances in which municipal officials could be found liable for failure to take action to prevent inevitable violations of clearly established constitutional rights.

B. Municipal Liability in This Case Will Not Lead to Strict Liability Against Municipalities.

Rejection of the arbitrary "single-incident" rule proposed by the city would not result in § 1983 municipal liability for all wrongs committed by a municipality's police officers and other employees.

The city's rigid view ignores that a continuum of culpability extends from strict liability at one extreme to purposeful wrongdoing at the other.[26] Section 1983 does

[26] Intermediate points, in order of increasing culpability, have in various contexts been termed negligence, gross negligence, recklessness, and knowledge.

not permit respondeat superior liability against municipalities. Monell, 436 U.S. at 691. But neither is municipal liability limited only to instances at the opposite extreme -- purposeful wrongdoing. This Court has rejected the view that a § 1983 defendant may be liable only for its actions that purposefully contravene federal rights. See Parratt v. Taylor, 451 U.S. 527, 534 (1981) ("Nothing in ... § 1983 ... limits the statute solely to intentional deprivations of constitutional rights" or denies liability for a "wrong ... negligently as opposed to intentionally committed"); Baker v. McCollan, 443 U.S. 137, 139-40 (1979).

Of course, in the context of municipal liability for a failure to act, a plaintiff must show a sufficient degree of actual or constructive awareness on the part of municipal policymakers so that a failure to act can be fairly characterized as the cause

of the constitutional violation and resulting harm. Thus, not every failure to train or to supervise that resulted in harm would justify liability. Drawing on this Court's cases, most lower courts have correctly noted that a municipality's failure to act can be fairly deemed a custom for § 1983 purposes only if that failure constitutes gross negligence, recklessness, or "deliberate indifference" to a plaintiff's constitutional rights.[27]

---

[27] See, e.g., Wellington v. Daniels, 717 F.2d at 936; Hays v. Jefferson County, 668 F.2d at 871-73; Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981); Turpin v. Mailet, 619 F.2d at 202; Owens v. Haas, 601 F.2d at 1246; Leite v. City of Providence, 463 F. Supp. at 590-91. But see Gilmere v. City of Atlanta, 737 F.2d 894, 904 (11th Cir. 1984) (holding "gross negligence" or "deliberate indifference" improper as test for adjudging due process § 1983 claim against municipality). The Eleventh Circuit in Gilmere simply overlooked this Court's construction of § 1983 in Monell, where this Court stated that the framers of the statute intended to create a remedy where state actors were "deliberately indifferent to the rights of black citizens." 436 U.S. at 685 n. 45. The "deliberate indifference" standard finds further support in Estelle v. Gamble, 429 U.S. 97 (1976), a § 1983 suit alleging an Eighth Amendment violation for inadequate medical care in prison. This Court held that mere negligent failure to provide proper care did not state a valid § 1983 cause of action. Instead, [cont'd. on next pg]

Liability may attach only when the municipality's failure to train, supervise, or discipline its employees is so egregious as to indicate that municipal policymakers simply did not care about the inevitable consequences of not taking any corrective action. Thus, the municipality is not held liable for the actions of its employees on a respondeat superior basis. Rather, the municipality is held liable for its own actions that proximately cause a deprivation of constitutional rights. Since municipal liability for inaction arises only when there exists highly foreseeable harm resulting from that inaction, there is little threat that rejection of the city's theory would lead to a raid on municipal treasuries for every misdeed of a police officer. Given that

---

this Court required the plaintiff to show that the state officials acted with "deliberate indifference" to the probable constitutional violation. Id. at 104-06.

state and local officials may be liable under § 1983 for punitive damages for "reckless or callous disregard for the plaintiff's rights," Smith v. Wade, 75 L.Ed.2d 632, 648 (1983), it would be ironic indeed if this Court barred municipality liability for mere compensatory damages where, as here, a jury had found that the acts or omissions of municipal policymakers evidenced deliberate indifference to Tuttle's rights and caused his death.

II. A Rule Barring Municipal Liability For Inadequate Training and Supervision Resulting in a Single Incident of Official Misconduct Would Eviscerate The Compensatory and Deterrent Goals of 42 U.S.C. § 1983.

A. The Legislative History of § 1983 Evinces Congressional Intent to Impose Liability on Municipalities Not Only for Affirmative Harms, But Also for Failure to Act to Protect the Constitutional Rights of Citizens.

The framers of section one of the Civil Rights Act of 1971,[28] the forerunner of

§ 1983, specifically intended to create a remedy not only for affirmative denials of constitutional rights, but also for failures by government officials to take adequate measures to protect those rights. "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [the Act]." Monroe v. Pape, 365 U.S. at 174-75. A passive denial of protection, while perhaps harder to discern than an illegal affirmative act, causes no less harm to the victim. In canvassing the legislative history of the Act, this Court stated in Monell that section one "extended a remedy not only where a State had passed an unconstitutional statute, but also where officers of the State were deliberately indifferent to the rights of

[28] Act of April 20, 1871, Ch. 22, 17 Stat. 13 (1871).

black citizens." 436 U.S. at 685 n. 45.[29]

Representative Hoar stated during the congressional debate over section one of the Act that

> denial ... of the protection of the laws [is not] to provide merely for the case of an affirmative formal exercise of power by the State in derogation of civil rights ... [but also] when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection.

Cong. Globe, 42d Cong., 1st Sess. 334 (1871) [hereinafter cited as "Cong. Globe"]. Representative Sheldon, urging that "it is the highest duty of the government to provide means to protect and secure every citizen in

[29] While the desire to protect black citizens through enforcement of the Civil War Amendments may have motivated congressional supporters of section one of the Civil Rights Act, Congress framed the statute in general terms, creating a federal cause of action for the deprivation, under color of state law, "of any rights ... secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983; see Monroe v. Pape, 365 U.S. at 183 ("[A]lthough [§ 1983] was enacted because of the conditions that existed in the South at that time, it is cast in general language ...").

undisturbed enjoyment" of his constitutional rights, said:

> It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its power, through its courts, in times of peace, directly to the individual who is deprived of his rights, ... whether through the positive act or the default of the State authorities.

Cong. Globe 367-68 (emphasis added).

Representative (later President) Garfield, in voicing his support for the bill, explained that the statute would reach maladministration of the laws as well as neglect or refusal to enforce them. Cong. Globe, 42d Cong., 1st Sess. App. 153 (1871) [hereinafter cited as "Con. Globe App."];[30]

[30] Rep. Garfield stated: "[B]y a systematic maladministration of [state laws], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is made out, I believe the last clause of the first section [of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." Cong. Globe App. [cont'd. on next pg]

see also Cong. Globe 428 (Rep. Beatty) (states have denied persons equal protection, through "lack of power or inclination"); id. at 459 (Rep. Coburn) (unlawful state action not always affirmative); Cong. Globe App. 78, 80 (Rep. Perry) (local officials fail to take action against illegal activity); id. at 147 (Rep. Shanks) ("the civil authorities lie dumb before the violators of the law"); id. at 300 (Rep. Stevenson) (denial of equal protection is more often passive than active).[31]

B. The Compensatory and Deterrent Functions of § 1983 Require Municipal Liability Under the Circumstances of this Case.

Compensation of the victims of

153. Section one of the Act did not, of course, limit itself to enforcement of the equal protection clause of the Fourteenth Amendment. See supra note 29.

[31] See generally Developments, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1141-56 (1977); Note, Municipal Liability Under Section 1983: The Meaning of "Policy or Custom," 79 Colum. L. Rev. 304, 307-09 (1979).

unconstitutional action and deterrence of like misconduct in the future constitute the primary goals of § 1983. See Owen v. City of Independence, 445 U.S. at 651; Robertson v. Wegmann, 436 U.S. 584, 591 (1978); Carey v. Piphus, 435 U.S. 247, 256-57 (1978). In enacting section one of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, Congress adopted a specific policy intended to effect the goals of compensation and deterrence: Congress made those persons (including municipalities) who, under color of state law, violate a person's constitutional rights liable for injuries resulting from the violation. Any rule that would shield a municipality from § 1983 liability for its unconstitutional actions, regardless of the municipality's deliberate indifference to the potential harm, the municipality's causal responsibility, or the severity of the injury incurred, would

subvert the compensatory and deterrent purposes of § 1983.[32]

As the Court has emphasized in recent decisions, municipal liability plays a critical role in fulfilling the compensatory purpose of the statute. In Monell, 436 U.S. at 685 & n. 45, the Court noted that statements by supporters of § 1983 indicated Congress' intention to redress the unconstitutional misconduct of even municipalities by making those municipalities liable for compensatory damages. Later, in holding that a municipality does not enjoy

---

[32] See J.O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damages Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 456 (1978) (goals of compensation and deterrence more frequently met if defendant is the government, not an individual); cf. Robertson v. Wegmann, 436 U.S. at 599 (Blackmun, J., dissenting) (objecting to a state survivorship law that abated a § 1983 claim where there was obvious unconstitutional misconduct because "[a]ny crabbed rule of survivorship obviously interferes directly with the second critical interest [deterrence] and may well interfere with the first [compensation]").

qualified immunity under § 1983 based on the good-faith actions of its officers, the Court emphasized that compensatory damages "[are] a vital component of any scheme for vindicating cherished constitutional guarantees." Owen v. City of Independence, 445 U.S. at 651; see Carey v. Piphus, 435 at 254-56 (§ 1983 damages should compensate persons for injuries caused by deprivation of constitutional rights); cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (in action for damages directly under Fourth Amendment, plaintiff is entitled to compensation); Butz v. Economou, 438 U.S. 478, 506 (1978) (in Bivens action, damages can be important means of vindicating constitutional guarantees). In both Monell and Owen, the compensatory purpose of § 1983 served as a rationale for refusing to shield municipalities from § 1983 liability.

The importance of compensation for constitutional wrongs "is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Owen v. City of Independence, 445 U.S. at 651. Local police should protect citizens against violent, lawless behavior, not subject them to it. When a municipality's willful indifference to the training or supervision of its police officers is so substantial as to predictably cause a deprivation of liberty and life without due process, albeit in a single incident, the victim of the municipality's unconstitutional misconduct should receive compensation.[33] From the victim's perspective, there is only one opportunity for compensation. The city's reading of § 1983 would always leave uncompensated at

[33] In addition, a municipality is far less likely to be judgment-proof than is a city police officer.

least the first victim of a municipality's unconstitutional custom.

Deterrence serves, with compensation, as an essential purpose behind § 1983. Owen v. City of Independence, 445 U.S. at 651; Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981); Robertson v. Wegmann, 436 U.S. at 590-91; Carey v. Piphus, 435 U.S. at 256-57; Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring in the judgment).[34] In explaining the deterrent rationale for holding that municipalities do not have qualified immunity under § 1983, the Court in Owen stated:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not,

[34] See also Carlson v. Green, 446 U.S. 14, 21 & n. 6 (1980) (Bivens remedy has deterrent as well as compensatory purpose, and § 1983 serves similar purposes). The legislative history of § 1983 contains numerous references to the intended deterrent effect of the statute. See Schnapper, Civil Rights Litigation After Monell, 79 Colum. L. Rev. 213, 244-45 & n. 174 (1979) (quoting seven Congressmen).

> should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Owen v. City of Independence, 445 U.S. at 651-52 (footnotes and citation omitted). Cf. United States v. Johnson, 457 U.S. 537, 561 (1982) (retroactive application of decision upholding Fourth Amendment claim gives government incentive to err on side of constitutional behavior). Where, as here, a city gives its police officers negligible training in responding to armed robbery situations and routinely permits rookie

policemen to patrol (and to respond to armed robberies) alone, city officials should not be surprised when the unthinkable becomes inevitable: an unarmed man[35] is shot in the back in a dark parking lot while walking away from a drinking club where no robbery had occurred. Such an injury reflects a "systemic" failure of the kind that, as the Owen Court realized, could be eliminated by providing proper incentives to relevant

[35] The record indicates that Mr. Tuttle was unarmed at the time that Officer Rotramel fired the fatal shot. Rotramel admitted that he never saw any weapon. Jt. App. 158. Officer Lennox, who arrived at the scene soon after the shooting, searched and found nothing in Tuttle's boot. Id. 259-60. From the time of the shooting until Tuttle's arrival at the hospital, the police had Tuttle under their continuous and exclusive control. The police denied Mrs. Tuttle, who had arrived at the scene, access to her dying husband. Trial Transcript 231-32. Only after Mr. Tuttle had arrived at the hospital did a toy pistol appear in his boot. The sequence of events is, to say the least, suspicious. Cf. Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982) (detailing police use of "throw-down" weapons), petition for reh'g en banc granted, 711 F.2d 35 (5th Cir. 1983), vacated and remanded per curiam, 735 F.2d 838 (5th Cir.), aff'd in part, rev'd in part, and remanded per curiam, 739 F.2d 993 (5th Cir. 1984) (on petition for en banc rehearing).

municipal decisionmakers. When the possibility of liability would provide municipalities with an incentive to reduce the likelihood of this type of injury, any categorical bar against municipal liability would erode the basic purposes of § 1983.

The deterrent role of a § 1983 damages remedy in cases such as this has no current substitute. Los Angeles v. Lyons, 75 L.Ed.2d 675 (1983), effectively precludes injunctive relief under § 1983 against unconstitutional police practices. Federal criminal prosecutions for violations of federal civil rights[36] are only sporadically used, cannot be privately enforced, and require a heavier burden of proof than that required in a civil actior Further, a municipality is free from the spectre of punitive damages for its constitutional violations. Newport v. Fact Concerts, Inc., supra.

[36] E.g., 18 U.S.C. §§ 241, 242, & 245.

Moreover, given that defendant officials will often enjoy either absolute[37] or qualified[38] immunity from § 1983 liability, to deny municipal liability for an entire class of cases will leave victims without compensation and will provide no incentive to potential defendants to minimize unconstitutional behavior. Cf. Marbury v. Madison, 1 Cranch 137, 163 (1803) ("The very essence of civil liberty certain consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

[37] E.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges).

[38] E.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (broadening "good-faith" immunity by allowing defendants to satisfy only an objective standard).

C. A Municipality Is In The Best Position To Evaluate The Costs and Benefits of Additional Police Training and Supervision.

The § 1983 damages remedy is based in part on the theory of deterrence, which presupposes rational decisionmakers taking only those actions where benefits exceed costs. A damages remedy performs a deterrent function by forcing a party to consider the costs of certain action or inaction that would otherwise have been borne by some other party. Thus, damages serve to "internalize" costs to the decisionmaker. See generally G. Calabresi, The Costs of Accidents 68-129 (1970).

Under this view of deterrence, liability should be placed on the party best able to determine the true costs and benefits of a given course of action and to effect a change in behavior based on that determination.[39]

[39] See Calabresi & Hirschoff, Toward a Test for Strict Liability in Tort, 81 Yale L.J. 1055, 1060 (1972).

Common sense suggests that municipal police departments are more adept than individual police officers at identifying and evaluating "different strategies for deterring illegal [conduct] and can also better predict the likely effects of alternative deployments of police officers, training methods, or [behavioral] guidelines upon both deterrence and vigorous decisionmaking." P. Schuck, Suing Government 104 (1983) (footnote omitted). Judge Newman has noted more generally that municipal liability "enhance[s] the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence." J.O. Newman, supra note 32, at 457. The threat of liability "gives the [municipality] an incentive to minimize the 'good faith' unconstitutional errors of its police through more careful selection,

training, and supervision." Posner, Rethinking the Fourth Amendment, 1981 S. Ct. Rev. 49, 68; see also Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases, 57 Wash. L. Rev. 635, 641 (1982).

Had Oklahoma City assumed that it could be liable for the unconstitutional behavior of its police officers, it could have determined the likely cost and efficacy of: giving police trainees additional instruction in how to respond to suspected armed robbery situations and how to apprehend a fleeing suspect; prohibiting rookie officers from patrolling alone; and ordering rookies or all officers to request backup units in the type of situation that Officer Rotramel confronted.

A damages remedy, unlike an injunctive remedy, permits the municipality, rather than a judge, to choose the optimal mix between

street-level discretion, which may increase the cost of adverse verdicts,[40] and additional preventive measures.[41] A damages remedy thus provides general deterrence against constitutional violations while respecting the values of federalism that favor the decisionmaking independence of local officials. Cf. Rizzo v. Goode, 423 U.S. 362 (1976).

[40] Win or lose, a municipality often incurs litigation expenses to defend itself or its officers following an incident of police brutality. These expenses must be added to the cost of adverse verdicts to determine the actual cost of not taking preventive measures.

[41] "A rigorous empirical study of the effect of a New York City police department rule restricting officers' use of weapons found a decline in the use of deadly force without any effect on the incidence of crime, injuries to officers, or arrest activity." P. Schuck, supra page 46, at 144 (citing J. Fyfe, Shots Fired: An Examination of New York City Police Firearms Discharges (Univ. Microfilms Int'l 1978)).

CONCLUSION

Monell's holding that a municipality may be liable under § 1983 only if a municipal policy or custom caused a constitutional violation does not justify an arbitrary rule that gives municipalities at least one "free" constitutional violation by barring municipal liability except in cases in which an injured victim could prove a pattern of similar past abuses. Neither the legislative history and purpose of § 1983, this Court's decisions construing that statute, nor considerations of public policy support the city's crabbed reading of the statute.

For the foregoing reasons, the judgment of the United States Court of Appeals for the

Tenth Circuit should be affirmed.

Respectfully submitted,

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800*

DON ED PAYNE
American Civil Liberties
Union of Oklahoma
Foundation
P. O. Box 785
Hugo, Oklahoma 74743

December 15, 1984

* Counsel gratefully acknowledge the assistance of Carl H. Loewenson, Jr., a law school graduate whose application for admission to the New York State Bar is pending.